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I. Introduction

The case of the *Philadelphia Cordwainers*[1] in 1806 revolutionized the legal relations between labor and capital in the United States. According to the theory of criminal conspiracy articulated in the case, workers were prohibited from acting in concert to improve their wages and working conditions, and such combinations were deemed to be punishable at common law. That legal principle was ostensibly modified in *Commonwealth v. Hunt*[2] in 1842, but, in fact, conspiracy prosecutions against workers were maintained successfully until the early decades of the twentieth century.

In two related aspects, the law was crucial to the evolving capitalistic method of production. First, it performed a coercive function by imposing direct legal sanctions against workers who exercised their collective economic strength against employers. Second, in its broad social and cultural dimension, the law propounded an ideology that explained and legitimated the capitalist organization of the labor process and deflected any significant public support for the workers' opposition to changing labor conditions. Without the legal environment created by the various conspiracy prosecutions, the capitalist program of industrial discipline could not have been conducted effectively, and without discipline, the capitalist organization of production could not have been effected under the historical conditions of the early nineteenth century.

The nature of industrial discipline arises from the particular characteristics of the labor bargain under capitalism. As Marx pointed out, the purchase of labor involves a unique feature in that

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1. Commonwealth v. Pullis (Mayor's Court Phila. 1806), in 3 DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (J. Commons & E. Gilmore ed. 1910) [hereinafter DOCUMENTARY HISTORY].

2. 45 Mass. (4 Met.) 111 (1842).

the transaction is not complete when the worker sells labor to the capitalist; the capitalist actually possesses only potential labor power and must realize its value through its expenditure by the worker.[3] That process remains a fundamental issue in the capitalist organization of production. One contemporary formulation, for example, provides as follows:

> Here is a real peculiarity of labor-power. The enjoyment of the use-value of any other commodity is nonproblematic: the bread does not resist being eaten. Not so with labor-power. Its "use value" is not delivered, it is not offered, it is not consumed. It must be extracted. This process of extraction engages the energies of armies of supervisors, time-motion men, guards, spies, and bosses of all descriptions.[4]

The labor process, whereby labor power is extracted and surplus value is created for appropriation, hinges on the capitalist's ability to control workers at the point of production.[5] Discipline, which must

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3. One consequence of the particular nature of labor-power as a commodity, Marx said, is that:

> its use-value does not, on the conclusion of the contract between the buyer and seller, immediately pass into the hands of the former. Its value, like that of every other commodity, is already fixed before it goes into circulation, since a definite quantity of social labour has been spent upon it; but its use-value consists in the subsequent exercise of its force. The alienation of labour-power and its actual appropriation by the buyer, its employment as a use-value, are separated by an interval of time.

1 K. MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 174 (F. Engels ed.; S. Moore & E. Aveling trans. 1965). The concept of "use-value" and its relation to labor is analyzed in G. PILLING, MARX'S CAPITAL: PHILOSOPHY AND POLITICAL ECONOMY 41-56 (1980). Pilling emphasizes that Marx's categories derive from an analysis of social conditions rather than from the abstract theories of "value" prevalent among Classical economists. For Marx, the exchange of commodities, including money, was embedded in social relations. Pilling explains as follows:

> Marx showed that value is nothing else but the embodiment of human labour in the abstract, the quantity of which is measured by socially necessary working time. It became possible to get to the essence of value, to define this concept adequately only in the conditions of capitalist production, where the equality and equivalence of all forms of labour was revealed, when the predominant social relationship between people became their relationship as commodity owners, when the producers were finally separated from the means of production and labour power itself became a commodity.

Id. at 16. The "labor theory of value" espoused by working-class radicals in the early eighteenth century was based on the notion that labor created all wealth in society. That wealth, however, was appropriated by the rich and powerful, who produced nothing. *See generally* E. PESSEN, MOST UNCOMMON JACKSONIANS: THE RADICAL LEADERS OF THE EARLY LABOR MOVEMENT (1967).

4. Gintis & Bowles, *Structure and Practice in the Labor Theory of Value*, REV. OF RADICAL POL. ECON., Winter 1981, at 1, 14 (1981).

5. Marx describes two "characteristic phenomena" associated with the consumption of labor power. "First, the labourer works under the control of the capitalist to whom his labour belongs . . . ." Second, "the product is the property of the capitalist and not that of the labourer, its immediate producer." The aim of the capitalist is "to produce a commodity whose

be ultimately enforced through the penalty of discharge, is the primary means of control. The only effective response by workers is group resistance, because the capitalist cannot feasibly discharge the entire work force. For the capitalist, it consequently becomes imperative "to stratify the workforce in order to minimize worker solidarity" and that may be accomplished by "[t]urning the division of labor into a hierarchy of diverse and antagonistic fragments."[6] In the modern industrial setting, for instance, racism and sexism are common devices by which capitalists can dissipate the perceived commonality of interest within a work group and reduce the bargaining power of all workers as a class.[7]

Viewed in its relation to the emerging factory system, the conspiracy doctrine was ideally suited to the aim of destroying working class solidarity. Instrumentally, it outlawed organized worker resistance to the intensification and exploitation of labor. Simultaneously, the doctrine was articulated in a manner that eroded class identity and interest. Through an examination of the social and economic context in which the legal rule was developed and perpetuated, it becomes evident that the common law of conspiracy was a vital element in the industrial order of the nineteenth century.

II. The Social Origin of Workplace Discipline

The first major phase of economic development in this country extended from the early nineteenth century into the decade of the 1890's. During that period, which Edwards, Reich, and Gordon characterize as the stage of "initial proletarianization," the American economy evolved from a largely agricultural basis to an industrial one, and the predominant form of economic activity became wage labor.[8] The process, despite its concrete historical complexity, was essentially "uniformly simple." The groups comprising the precapitalist working population were "emancipated" from their liveli-

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value shall be greater than the sum of the values of the commodities used in its production, that is, of the means of production and the labour-power, that he purchased with his good money in the open market." K. MARX, *supra* note 3, at 184-86.

6. Gintis & Bowles, *supra* note 4, at 15.

7. The proposition is empirically demonstrated in M. REICH, RACIAL INEQUALITY: A POLITICAL-ECONOMIC ANALYSIS (1981). Reich contends that capitalist employers are concerned with profitability rather than efficiency and that "[w]orker solidarity tends to retard productivity while advancing wage pressures on capitalists." Therefore, "[h]iring, pay, and promotion policies that reduce and limit worker solidarity serve the interests of individual capitalists and persist in both perfectly competitive and monopsonistically competitive markets." *Id.* at 202.

8. D. GORDON, R. EDWARDS & M. REICH, SEGMENTED WORK, DIVIDED WORKERS: THE HISTORICAL TRANSFORMATION OF LABOR IN THE UNITED STATES 48-99 (1982).

hood; "[t]hose who became wage workers had first been stripped of their means of production—freed or deprived, that is, of all alternate ways of supporting themselves. They were driven to wage labor."[9]

Despite technological innovation during the period, the prevalence of wage labor within the factory setting did not arise as a consequence of changes in the technological basis of the labor process itself. Methods of production remained unaltered for a significant time after the reorganization of labor power, and "[t]he persistence of traditional techniques within the capitalist sector, even within those large works employing a substantial labor force, could be seen in diverse industries."[10] As Stephen Marglin concluded in an influential essay, the rise of the factory system cannot be explained as a technological imperative, for most new methods of production, such as the spinning-jenny, might have been incorporated into the "putting-out" system of independent producers.[11] The basis of the factory system was rather an intensified supervision of workers. Marglin observes as follows: "The key to the success of the factory, as well as its aspiration, was the substitution of capitalists' for workers' control of the production process; discipline and supervision could and did reduce costs *without* being technologically superior."[12] Thus, the benefit accruing from the factory organization was not one of economic "efficiency." There was instead "a larger output in return for a greater input of labor, not more output for the same input."[13]

Referring to the writings of Andrew Ure, an eighteenth-century author, Marglin demonstrates that contemporary observers of industrialization understood quite clearly that the true advantage of the factory system lay with its superior organization of the labor process and not with technological development. Ure, to illustrate, regarded Richard Arkwright as the exemplary British factory owner, and in his *Philosophy of Manufacturers*, Ure particularly credits Arkwright for introducing and maintaining a system of labor organization rather than for creating a mechanism for the production of cot-

9. *Id.* at 56.

10. *Id.* at 85.

11. Marglin, *What Do Bosses Do? The Origins and Functions of Hierarchy in Capitalist Production*, REV. OF RADICAL POL. ECON., Summer 1974, at 33; *see also* D. CLAWSON, BUREAUCRACY AND THE LABOR PROCESS: THE TRANSFORMATION OF U.S. INDUSTRY, 1860-1920 36-70 (1980) (describing the organizational changes in the labor process that were prior to, and a condition of, technological advances); D. NOBLE, FORCES OF PRODUCTION: A SOCIAL HISTORY OF INDUSTRIAL AUTOMATION (1984) (tracing the development of numerical control technology after World War II and arguing that technological change was not based on superior efficiency but on considerations of class domination).

12. Marglin, *supra* note 11, at 46 (emphasis in original).

13. *Id.* at 51.

ton thread. Ure wrote as follows:

> The main difficulty did not, to my apprehension, lie so much in the invention of a self-acting mechanism for drawing out and twisting cotton into a continuous thread, as in the distribution of the different members of the apparatus into one co-operative body, in impelling each organ with its appropriate delicacy and speed, and, above all, in training human beings to renounce their desultory habits of work, and to identify themselves with the unvarying regularity of the complex automaton.[14]

Ure thus focuses on the organizational aspects of Arkwright's enterprise, and he emphasizes that factory discipline was intended to modify workers' consciousness with regard to the labor process by forcing them "to identify themselves with the unvarying regularity of the complex automaton." Ure concludes that the imposition of a new relation of production was Arkwright's most significant contribution to the factory system: "To devise and administer a successful code of factory discipline, suited to the necessities of factory diligence, was the Herculean enterprise, the novel achievement of Arkwright."[15]

Other capitalists of the period, such as Josiah Wedgwood, undertook similar cultivation of the working class. In Wedgwood's view, it was essential that factory labor be trained for both the actual requirements of the task and habituated to the factory environment as well. The demands of factory work, however, ran counter to the cultural attitudes of the community, and there was substantial resistance to Wedgwood's efforts. One historian notes that "[t]he potters had enjoyed their independence too long to take kindly to the rules which Wedgwood attempted to enforce—the punctuality, the constant attendance, the fixed hours, the scrupulous standards of care and cleanliness, the avoidance of waste, the ban on drinking. They did not surrender easily."[16]

Particularly critical to employers was the matter of punctual attendance, and time began to assume an increasingly important role in the cultural conflict. Wedgwood distinguished himself by introducing the bell to signal the beginning of the working day, which commenced " '¼ of an hour before (the men) can see to work,' "[17] and he refined the system of attendance with a form of time cards through which absenteeism could be carefully monitored. Among his

14. A. URE, PHILOSOPHY OF MANUFACTURERS, OR AN EXPOSITION OF THE SCIENTIFIC, MORAL AND COMMERCIAL ECONOMY OF THE FACTORY SYSTEM OF GREAT BRITAIN 15 (1835).
15. *Id.*
16. McKendrick, *Josiah Wedgwood and Factory Discipline*, 4 HIST. J. 30, 38 (1961).
17. *Id.* at 41 (quoting Wedgwood's manuscripts).

contemporaries, Wedgwood's ideas "to encourage punctuality and prevent loss of working time seem to be without equal."[18] Moreover, the environment in Wedgwood's factories was not an "indulgent" one; contrary to their traditions, laborers were forced to work at fixed hours on a regular basis. "The cherished St. Monday was to be unfrocked, and all the gods of idleness and mindless enjoyment similarly banished. Time was the new idol—together with care, regularity and obedience."[19]

In his analysis of time and discipline in the emerging factory system, the British historian E.P. Thompson contrasts industrialized time with work in precapitalist societies.[20] The latter, Thompson observes, reveal an orientation toward labor that is appropriately described as a "task-orientation" possessing three important features. First, task orientation is a relatively comprehensible form of activity, based as it is on an "observed necessity." Second, in task-oriented societies, there is less emphasis on the distinction between "work" and other relationships: "Social intercourse and labour are intermingled — the working-day lengthens or contracts according to the task — and there is no great sense of conflict between labour and 'passing the time of day'." Last, the task-oriented activity appears to time-workers "to be wasteful and lacking in urgency."[21]

To impose a new consciousness of work on factory labor, the industrialists engaged in a broad campaign inside and outside the factories. In the workplace, the new habits were forged by a variety of means. Among them were "the division of labour; the supervision of labour; bells and clocks; money incentives; preachings and schoolings; the suppression of fairs and sports."[22] Simultaneously, the awareness of "time-thrift" increasingly was transmitted through cultural channels; as Thompson comments, "In early Victorian tracts and reading-matter aimed at the masses one is choked by the quantity of the stuff."[23]

The development of specific disciplinary strategies to inculcate the appropriate consciousness in British workers was analyzed by Sidney Pollard, a leading economic historian. In his study, Pollard emphasizes that "one of the most critical, and one of the most diffi-

18. *Id.*
19. *Id.* at 51.
20. Thompson, *Time, Work-Discipline, and Industrial Capitalism*, 38 PAST AND PRESENT 56 (1967).
21. *Id.* at 60.
22. *Id.* at 90.
23. *Id.*

cult, transformations required in an industrializing society is the adjustment of labour to the regularity and discipline of factory work."[24] Employers were confronted with a working population which was "non-accumulative, non-acquisitive, accustomed to work for subsistence, not for maximization of income"; the capitalist mandate was to create a class "obedient to the cash stimulus, and obedient in such a way as to react precisely to the stimuli provided."[25]

According to Pollard, "Dismissal and the threat of dismissal, were in fact the main deterrent instruments of enforcing discipline in the factories."[26] Discharges, however, could only be effectively threatened or undertaken when labor market conditions permitted. Labor shortages reduced the employers' power; as Pollard notes, "Many [employers] abolished the apprentice system in order to gain it, and without it others were unable to keep any control whatsoever."[27] Similarly, in the case of skilled workers who could not be replaced easily, discharge was a problematic form of discipline.

Concerning organized worker resistance to discipline, Pollard observes that "[t]he law could usually be assumed to be at the service of the employer" in defeating any concerted activity; in any event, "[w]orkmen's combinations were widely treated as criminal offences in employers' circles, even before the law made them explicitly such . . . ."[28] Typically, employers reacted to organizing efforts by workers by such steps as dismissal and blacklisting.

In general, Pollard concludes, the task of adjusting workers to factory discipline was immense and unique. To that end, British capitalists "used not only industrial means but a whole battery of extramural powers, including their control over the courts, their powers as landlords, and their own ideology, to impose the control they required."[29] Workers' values were usually destroyed in the process.

Industrialization in the United States was characterized by conflicts of culture and values similar to those experienced by British workers. Herbert Gutman, in his important analysis of work and culture in the United States,[30] argues that the impact of industrialization resulted "from the fact that the American working class was

24. Pollard, *Factory Discipline in the Industrial Revolution* 16 ECON. HIST. REV. 254 (1963).
25. *Id.*
26. *Id.* at 261.
27. *Id.*
28. *Id.* at 262.
29. *Id.* at 270.
30. *See* Gutman, *Work, Culture and Society in Industrializing America, 1815-1919*, 78 AM. HIST. REV. 531 (1973).

continually altered in its composition by infusions, from within and without the nation, of peasants, farmers, skilled artisans, and casual day laborers who brought into industrial society ways of work and other habits and values not associated with industrial necessities and the industrial ethos."[31] In fact, he concludes, the persistent influx of new groups into the American working class generated throughout the period 1815-1920 a recurrent pattern of collective behavior "usually only associated with the early phases of industrialization."[32] Accordingly, the dissolution and reconstitution of social values associated with industrial development was a continuous process in this country during the nineteenth century.

An excellent illustration of the cultural transformation, which also serves to locate the earliest conspiracy prosecutions in their social context, is found in Paul Faler's study of the shoemakers of Lynn, Massachusetts.[33] Tracing the formation of class consciousness in that community, Faler begins from the premise that class is a function of a particular relation to the means of production, and "class consciousness" is the articulation of class experience "in ideas, traditions, folklore, and institutions."[34] The origin of a class relationship between labor and capital in the shoe making industry was an alteration in the organization of production; specifically, it involved "the physical separation of journeymen from employer at the work place."[35] The fundamental difference between capital and labor, at that time, was that the master no longer participated in the production of shoes, but became a shoe manufacturer. Although the separation commenced with the removal of the employer from the location where shoes were made, the journeymen and employers continued for a time to share certain cultural traditions. Eventually, however, the presence of large manufacturers led to "an agitation among the shoemakers that grew in extent and intensity in each decade between 1830 and 1860."[36]

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31. *Id.* at 541.

32. *Id.* at 543.

33. P. FALER, MECHANICS AND MANUFACTURES IN THE EARLY INDUSTRIAL REVOLUTION: LYNN, MASSACHUSETTS, 1780-1860 (1981). Lynn is also the subject of another book-length study. *See* A. DAWLEY, CLASS AND COMMUNITY: THE INDUSTRIAL REVOLUTION IN LYNN (1976). Faler's work, however, is the more elaborate and penetrating examination of the evolving social consciousness within the community under emergent capitalism. For a concise overview of the theme of culture and industrialization in recent scholarship, see Cantor, *Introduction* to AMERICAN WORKINGCLASS CULTURE: EXPLORATIONS IN AMERICAN LABOR AND SOCIAL HISTORY 3-30 (M. Cantor ed. 1979).

34. P. FALER, *supra* note 33, at 165.

35. *Id.* at 166.

36. *Id.* at 168; *see also* Commons, *Introduction* to 3 DOCUMENTARY HISTORY, *supra* note 1, at 19-58. Commons' description of the transformation in the shoemaking industry is

The complaints of the Lynn shoemakers against the "bosses" and "grinders" assumed a form common to working class radicalism in this country. As economic conditions deteriorated during the period, relations between worker and employer worsened. Among their strategies of exploitation, manufacturers introduced the practice of paying wages in the form of drafts against the capitalist's store, which were discounted as much as twenty-five to thirty-five percent.[37] In addition, the decline in real wages between 1830 and 1860 forced workers to produce more shoes, usually of lower quality, to maintain their income. The availability of a reserve labor market of "outworkers" in the region surrounding Lynn also figured in the power of employers, who used the competition between the two groups to resist wage demands by either.[38]

In his analysis of the working class reaction to the evolving depredations of capitalism, Faler concludes that the crucial philosophical basis was the labor theory of value, which became "the cardinal tenet in the mechanic ideology of both journeymen and masters who formed the bulk of the town's population."[39] Basically, the labor theory of value held that all wealth was created by the productive activity of workers.[40] The most radical extension of the principle led to the belief that labor was entitled to all the wealth flowing from productive work; the class of nonproducers, such as lawyers, bankers, and merchants, wrongly appropriated the benefits of labor. The growing disparity between the economic conditions of workers and the rising class of capitalists exacerbated the philosophical antagonism expressed by workers.

The language in which the emerging class conflict was cast came largely from two sources: the cultural connotations associated with the term "mechanic" and the idiom of the American Revolution. "Mechanics" or workers were asserted to be the producers of wealth within the community, and they claimed respect and status on an equivalent footing with other citizens.[41] Their resistance to ex-

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the classic work on the subject. Commons concluded that expanding markets led to the reorganization of the relations of production; technology within the industry remained largely unchanged until the Civil War.

37. P. FALER, *supra* note 33, at 170.

38. *Id.* at 174.

39. *Id.* at 176.

40. For contemporary discussions of the point, see B. LAURIE, WORKING PEOPLE OF PHILADELPHIA, 1800-1850 75-83 (1980); E. PESSEN, *supra* note 3; Gintis & Bowles, *supra* note 4.

41. According to the mechanic ideology,

> [t]he social structure should reflect the hierarchy of human needs, giving first rank to the producers and relegating the parasitic non-producers to the bot-

ploitation and oppression by the capitalist was analogous in their view to the struggle against British tyranny; just as mechanics played a central role in the war of independence, so they continued to proclaim notions of equality and independence within the community.[42] Gradually, with the increasing estrangement of master and journeyman, the two strands of social thought became indistinguishable; in Faler's words, "Here was the point at which the labor theory of value and the heritage of the revolution merged, leading [workers] to comprehend the system they confronted: its source of power and powerlessness, of wealth and poverty, of rulers and ruled."[43]

To summarize, the factory system from its inception required discipline as a means of control over workers. Innovations in technology did not lead to the creation of factories; factories arose in conjunction with new forms of organizing the processes of production, and the developing technology further enabled capitalists to enhance their control within the factory.[44] The need for a sustained and permanent disciplinary program was itself a revolutionary element within the evolving capitalist environment, and it necessitated social change that had a profound impact on the cultural traditions of workers. Workers sought to preserve their culture, among other means, by articulating a vision of themselves as productive citizens

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tom of society. Power, position and prestige should go to those groups that were essential for the maintenance of human life. Highest rank would go to men of talent and ability who stood at the top of the trade in which they worked.

P. FALER, *supra* note 33, at 31.

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> [W]hen Federalist personalities were condemned as aristocrats, they were pilloried for an outlook that placed mechanics as men of inferior political capabilities, whose duty it was to adhere to the decision of their social betters. This attitude, and the word "aristocrat" itself, was also directly associated with the meaning of the Revolution. Many tradesmen identified the Federalists, who generally defended the British cause in the diplomatic quarrels of the day, with the hated British enemy of '76. With wartime antagonisms still very much alive, this connection proved most effective.

H. ROCK, ARTISANS OF THE NEW REPUBLIC: THE TRADESMEN OF NEW YORK CITY IN THE AGE OF JEFFERSON 57 (1979).

43. P. FALER, *supra* note 33, at 188.

44. Clawson observes as follows:

> In this transition [from handicraft to manufacture], workers are gathered together into large groups under the discipline and control of a capitalist. Even though no new tools or machines are introduced, capitalists achieve all the benefits which are described by the social control theory (control over work hours, embezzlement, and work rhythms). The point of Marx's analysis is that this *organizational* change precedes, both historically and analytically, the technological revolution which is the foundation of modern industry. The transition to manufacture is a social, not a technical change. To understand why it took place we should look not to technology but to the material interest of the emerging capitalist class.

D. CLAWSON, *supra* note 11, at 57 (emphasis in original).

within the community. Consistent with the labor theory of value, they demanded an adequate wage and recognition of their social contribution. In opposing the encroachments of capitalism, they frequently relied on the ideals and idiom of the Revolutionary War.

The law, at once a repository of institutionalized force and of communal ideology, was the keystone of dynamic capitalism. The criminal penalties assessed against workers under the conspiracy doctrine were usually minimal, but the ideological impact of the legal proceedings was profound. Essentially, the terms of the legal discourse were merged with the terms of the social and political discourse. As workers sought through concerted work action to maintain their standing within the community, the conspiracy prosecutions institutionalized the class conflict manifested in the struggles occurring in the workplace. Through the judicial system, workers' social aspirations were degraded and deradicalized. Notions of equality, community, and class acquired capitalist connotations, rather than the meanings contended for by workers, and legal doctrine, with the one apparent exception of *Hunt*, functioned as a transparent device for administering power in the interests of capitalism.

III. Ideology, Discourse, and Class Conflict

In any consideration of the conspiracy doctrine from a perspective of class interest, the decision in *Commonwealth v. Hunt*[45] must be regarded as problematic.[46] Chief Justice Shaw's opinion is typically regarded as a modification of the doctrine tending to the advantage of the working class and contrary to the interests of the capitalist class, of which Shaw was a member.[47] In the most recent treatment of the conspiracy cases, for example, Wythe Holt explains *Hunt* within a framework of class conflict.[48] According to Holt's in-

45. 45 Mass. (4 Met.) 111 (1842).

46. *See, e.g.*, M. TURNER, THE EARLY AMERICAN LABOR CONSPIRACY CASES: THEIR PLACE IN LABOR LAW — A REINTERPRETATION 58 (1967) (examining the "persistent myth that *Commonwealth v. Hunt* holds a unique place in legal history"). Other major treatments of the conspiracy doctrine include the following: J. LANDIS, CASES ON LABOR LAW 33-38 (2d ed. 1942); L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 183-206 (1957); Holt, *Labour Conspiracy Cases in the United States, 1805-1842: Bias and Legitimation in Common Law Adjudication*, 22 OSGOODE HALL L.J. 591 (1984); Morris, *Criminal Conspiracy and Early Labor Combinations in New York*, 52 POL. SCI. Q. 51 (1937); Nelles, *Commonwealth v. Hunt*, 32 COLUMBIA L. REV. 1128 (1932); Nelles, *The First American Labor Case*, 41 YALE L.J. 165 (1931); Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922); Witte, *Early American Labor Cases*, 35 YALE L.J. 825 (1926).

47. *See, e.g.* Nelles, *Commonwealth v. Hunt*, *supra* note 46, at 1151-52.

48. *See* Holt, *supra* note 46.

terpretation, *Hunt* can best be viewed as an instance of judicial legitimation. The opinion, he contends, was sufficiently ambiguous that it was interpreted as a victory for workers and yet was subsequently relied on by the prosecution in later conspiracy proceedings. *Hunt* was thus ideological in nature and attempted to legitimate the common law by conveying a semblance of neutrality and fairness.[49] Despite its rigorous legal analysis, however, Holt's account does not significantly advance the analysis of earlier scholars. Those scholars also propounded the notion that Shaw decided the case on grounds extraneous to the litigation for the purpose of debilitating certain political movements antithetical to his class interests.[50] Thus, to comprehend the historical importance of *Hunt*, it is necessary to examine the ideological consequence of legal thought in a specific economic context.[51]

The Marxian theory of law as an instrument of class oppression can be utilized to explain the seeming inconsistencies in the evolution of the conspiracy doctrine. In the early conspiracy cases, the legal rules had an obvious instrumental link to the interests of the dominant economic class; that is, the rules openly furthered the economic power of employers. Those rules were not simplistically derived from the existence of an overt ruling class conspiracy. More appropriately, they originated from the material environment that characterized the emerging factory system. That environment influenced the forms of consciousness underlying the development of law. The point is made succinctly by Hugh Collins: "Since the class of owners of the means of production share similar experiences and perform approximately the same role in the relations of production, there emerges a dominant ideology which permeates their perceptions of interest."[52] Legal rules are formulated consistent with that ideological back-

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49. Holt argues as follows:

> I do not say that Shaw intended to fool the world, but I do say that the structures of liberal thought and common law judicial decision-making are such that they allow the intelligent ideologue to express an apparent concession in a manner which actually negates that concession and, in the end, keeps the ideologue's deep economic interest intact, all entirely "unconsciously."

Holt, *supra* note 46, at 645 n. 267.

50. *See, e.g.*, L. LEVY, *supra* note 46, at 200-06 (codification movement); Nelles, *Commonwealth v. Hunt*, *supra* note 46, at 1159 (tariff legislation). The specific interpretations are discussed *infra* text accompanying notes 162-190.

51. Holt's study contains a concise summary of the social and economic conditions surrounding the conspiracy doctrine. *See* Holt, *supra* note 46, at 605-12. The focus of this article, however, is on the control and discipline of workers in a capitalist system through the ideology of law. That particularized approach leads to significantly different emphases and conclusions from those reached by Holt.

52. H. COLLINS, MARXISM AND LAW 43 (1982).

ground, and eventually such rules are accepted as the normal and appropriate social order.

Occasionally, however, judicial decisions such as *Commonwealth v. Hunt* may inure to the evident benefit of the working class, a phenomenon logically incompatible with a reductionist version of the class conflict interpretation of law. Marxian theory explains such occurrences through the device of legal "autonomy." Superficially, the legal system guarantees neutrality and equality of access to all citizens. At the same time, however, "the appearance of autonomy conceals deep structural constraints upon the powers of the State apparatus which ensure that it faithfully pursues the interests of the ruling class."[53] Because its values permeate the social background of everyday life, the dominant class can create a cultural hegemony that conditions social existence. In this respect, the legal system plays a "vital role":

> In particular the legal framework of rules and doctrines provides a comprehensive interpretation and evaluation of social relationships and events which is in tune with the main themes in the dominant ideology. Because the legal system is encountered frequently in daily life, its systematic articulation and dissemination of a dominant ideology are some of the chief mechanisms for the establishment of ideological hegemony.[54]

Accordingly, law functions as a vehicle not only for the application of state-sanctioned force, but also for the transmission of attitudes, beliefs, and values.

By analogy, legal reasoning also can be accommodated to a theory of historical materialism. According to the Marxian tenet that "social being determines consciousness," the intellectual processes that produce a judicial decision must be viewed against the background of the dominant ideology of the capitalist class.[55] The technical features of legal reasoning, such as internal consistency and coherence, give the appearance of a discrete and autonomous system, but that seeming autonomy is constrained by existing principle and precedent that limits the range of available discourse in a given case. Moreover, the appearance of autonomy contributes to the acceptance of the Rule of Law as a source of legitimate authority in our society. Without a belief that "officials of the legal system can apply legal rules impartially through judicial logic without resort to considera-

53. *Id.* at 49.
54. *Id.* at 50.
55. *Id.* at 70-71.

tions of social justice or personal gain, then the Rule of Law ideal will wear thin."[56] Stated differently,

> [i]f the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just.[57]

Thus, law derives from the social relations of production and has an ideological dimension that reinforces patterns of class conflict. It accordingly follows that the language of law will manifest an ideological content in its particularized usages.[58]

A recent attempt by John Thompson to formulate a theory of ideology depends on a "critical" conception of ideology, which supposes that "ideology is essentially linked to the process of sustaining asymmetrical relations of power — that is, to the process of maintaining domination."[59] Thompson argues that the relation between language and ideology can be explored through an analysis of discourse, or the actual usages of language in a spoken or written form in a concrete social setting. The insights developed in Thompson's sketch of a methodology of interpretation can be applied to the discourse of the conspiracy cases.

Critique, Thompson argues, properly addresses at least three functional properties of ideology. First, ideology acts to legitimate a relation of domination, for its objective is the preservation and enhancement of social power. Second, it operates through dissimulation, in that it furthers the interests of one group while simultaneously and ostensibly furthering the interests of another. Third, ideology reifies a given condition or state of affairs by representing it as a historical and inevitable fact.[60] Thompson emphasizes that the analysis of ideology necessarily involves a "social-historical context" that focuses on "particular agents at particular times in particular

56. *Id.* at 136.

57. E. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 263 (1977).

58. There is substantial contemporary debate regarding Marxism, law, and ideology. *See generally* Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law*, 19 LAW & SOC'Y REV. 11 (1985); Stone, *The Place of Law in the Marxian Structure-Superstructure Archetype*, 19 LAW & SOC'Y REV. 39 (1985). The relationship of Marxist thought to the important new movement in legal scholarship known as Critical Legal Studies is problematic. For an excellent discussion of that point, see Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985).

59. J. THOMPSON, STUDIES IN THE THEORY OF IDEOLOGY 4 (1984).

60. *Id.* at 131.

settings" and an institutional context that examines "the *loci* of power and the crystallization of relations of domination."[61]

The conspiracy cases offer a compelling illustration of ideology manifested through the formulation and application of common law. Relations of power lay at the heart of the conspiracy prosecutions. The "social-historical" context is embedded in the testimony of the witnesses, the argument of counsel, and the instructions of the judges. In institutional terms, the common law action was an ideal process for the clash of antagonistic economic interests; the outcome of the trial conferred some superior legal right on one party, such as the right of employers to deal with workers on an individual rather than a group basis. In addition, it is significant to note that operative strategies of legitimation, dissimulation, and reification serve an important role in the major cases.

Between 1805 and 1842, workers were prosecuted under the conspiracy doctrine on some nineteen occasions.[62] In the decade following *Hunt*, there were no reported cases; by the time of *State v. Donaldson*[63] in 1867, however, the doctrine had been resurrected in its previous vitality and continued in force until the end of the century.[64] During the formative phases of the doctrine, exemplified by the cases of the *Philadelphia Cordwainers*[65] in 1806, the *New York Cordwainers*[66] in 1810, and the *Pittsburgh Cordwainers*[67] in 1815, there is a recurrent idiomatic motif evident in the legal discourse — that motif is the accretion of meaning around the term "community." *Hunt*, in sharp contrast, presents a new mode of discourse reflecting both an important shift in economic conditions and the movement in legal consciousness from instrumentalism to

61. *Id.* at 135.

62. For a list of cases, see M. TURNER, *supra* note 46, at 2 (Table I); Holt, *supra* note 46, at 662 (Table 1). Commonwealth *ex rel* Chew v. Carlisle, 1 Brightly Nisi Prius 36 (Pa. 1821) involved a suit against masters. Another case not referred to by Turner nor reported in DOCUMENTARY HISTORY is mentioned in Holt, *supra* note 46, at 592 n. 2.; it occurred in 1842 in Rockdale, Pennsylvania, and is described in A. WALLACE, ROCKDALE: THE GROWTH OF AN AMERICAN VILLAGE IN THE EARLY INDUSTRIAL REVOLUTION 359-65 (1978). The defendants in the case struck in response to a cut in piece rates and were found guilty of conspiracy.

63. 32 N.J.L 151 (1867).

64. "[M]ore conspiracy cases can be found to have followed *Commonwealth v. Hunt* than to have preceded it." M. TURNER, *supra* note 46, at 59.

65. Commonwealth v. Pullis (Mayor's Court Phila. 1806), in 3 DOCUMENTARY HISTORY, *supra* note 1, at 59 (discussed *infra* notes 69-104 and accompanying text).

66. People v. Melvin, 2 Wheeler 262 (1810), in 3 DOCUMENTARY HISTORY, *supra* note 1, at 251 (discussed *infra* notes 105-124 and accompanying text).

67. Commonwealth v. Morrow (Court of Quarter Sess. Allegheny Cty. 1815), in 4 DOCUMENTARY HISTORY, *supra* note 1, at 15 (discussed *infra* notes 125-133 and accompanying text).

"formalism."[68]

Implicit in the arguments centering on "community" were crucial notions of class difference. The emergent ideology of capitalism at once recognized the existence of a working class, but denied that the members of the class had common interests either with one another or with other citizens of the community. Simultaneously, then, the prosecution portrayed a *class* — workers who might rise up in combinations against their masters — and fractured its bonds of solidarity by depicting the attendant injury to individual workers and the larger society. Within the orbit of the notion of communal well-being gravitated the major derivative associations implicated in the ideological contest, including the terms "equality," "independence," "liberty," "freedom," and the "spirit of the Revolution."

IV. Conspiracy Doctrine Prior to *Hunt*

A. Philadelphia Cordwainers

The indictments in the landmark *Philadelphia Cordwainers* case[69] were drawn on the basis of English common law precedent. For that reason, one method of analyzing the conspiracy doctrine focuses on the narrow issue of the content of that precedent. Caesar Rodney and Walter Franklin, acting for the defense in *Philadelphia Cordwainers*, argued that the definition of conspiracy propounded by the prosecution and set forth in the indictments was not, in fact, a sufficiently accurate statement of English law to support a conviction. The exploration of that question encompasses the substantive and strictly legal content of the conspiracy doctrine.

A second approach to the conspiracy theory involves the underlying political economy of the doctrine. That approach considers whether, assuming English precedent was as stated by the prosecution, it should be applied in any event against American workers. The arguments on this issue, framed as an inquiry into public policy, give rise to the more general debate concerning the role of labor and capital in the community.

Analysis of the first question reveals a significant point, which is that the legal core of the conspiracy doctrine was never a neutral, objective principle susceptible of definitive articulation. The idealized

68. The evolution of American legal thought during this period is described in M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

69. Commonwealth v. Pullis (Mayor's Court Phila. 1806), in 3 DOCUMENTARY HISTORY, *supra* note 1, at 59.

features of the rule of law — clarity, coherence, and determinacy[70] — were conspicuously lacking from the conspiracy doctrine. On at least two occasions prior to *Hunt*, a principle identical to that adopted by Shaw had been the basis of decision by judges.[71] Further, most legal scholars are agreed that the common law rule in the *Philadelphia Cordwainers* case was not, in fact, the common law rule in England, but was based on English statutory law.[72] Thus, the doctrine could hardly have been the product of autonomous legal reasoning grounded on adherence to precedent, internal consistency, and neutral principle. From its inception to its eventual withering away, the "law" regulating labor conspiracies was indeterminate, malleable, and unpredictable. It was particularized by judges to attain a given result in each case.

The indictment in *Philadelphia Cordwainers* consisted of three counts. It alleged generally that the defendants conspired together "to increase and augment the prices and rates usually paid and allowed to them and other artificers, workmen, and journeymen, in the said art, and occupation, and unjustly to exact and procure great sums of money, for their work and labour . . . ."[73] The defendants were also alleged to have prevented "by threat, menaces, and other unlawful means," other journeymen from working "but at certain large prices, and rates which they . . . then and there fixed and insisted on being paid . . . ."[74] Finally, the defendants allegedly formed a club or society and conspired that none of them would work for a master who employed a worker who was not a member of the society or who infringed any of the society's rules. The prosecu-

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70. *See generally* Kairys, *Introduction* to THE POLITICS OF LAW 1-7 (D. Kairys ed. 1982). Kairys describes the idealized view of law as

> a decision-making process in which (1) the law on a particular issue is pre-existing, clear, predictable, and available to anyone with reasonable legal skill; (2) the facts relevant to disposition of a case are ascertained by objective hearing and evidentiary rules that reasonably ensure that the truth will emerge; (3) the result in a particular case is determined by a rather routine application of the law to the facts; and (4) except for the occasional bad judge, any reasonably competent and fair judge will reach the "correct" decision.

Id. at 1-2.

71. *See infra* text accompanying notes 134-46.

72. *See, e.g.*, Holt, *supra* note 46, at 602-05. Workers contended that

> apart from the statutes and the prosecutions founded upon them, the common law of England had never made a conspiracy of workers to raise wages a criminal offense. They argued that every reported English case which antedated 1776 (except one) and which held labourers to the doctrine of conspiracy had either been founded upon a statute or blindly followed the aberrational case.

Id. at 602-03.

73. 3 DOCUMENTARY HISTORY, *supra* note 1, at 62.

74. *Id.* at 64-65.

tion conceded that it was not unlawful for a worker to refuse to work for less wages than he desired, or, as Joseph Hopkinson for the prosecution explained, "The defendants are not indicted for regulating their own individual wages, but for undertaking by a combination, to regulate the price of the labour of others as well as their own."[75] Stated most narrowly, then, the crime charged against the defendants was that they had engaged in a conspiracy to achieve an end they might lawfully have undertaken as individuals to achieve.

The English authority on that precise point was exhaustively reviewed by the respective counsel in the case. Prosecutor Hopkinson asserted that "the mere combination to raise wages is considered an offence at common law . . . . All combinations to regulate the price of commodities is against the law."[76] To support that proposition, he primarily relied on the case of the journeymen tailors of Cambridge, as reported in volume eight of *Modern Cases in Law and Equity* (8 *Mod.*), as holding that "[a] conspiracy is unlawful, even though the matter might have been lawful, if done by them individually."[77]

Arguing for the defense, Rodney first attacked the accuracy of the report in 8 *Mod.* That work, he noted, had been condemned by English authorities as a "miserable bad book," and was treated "with the contempt it deserves."[78] Consequently, he concluded, the theory that lawful acts could be rendered unlawful by conspiracy was suspect.

Moreover, Rodney contended, there was an important distinction between the circumstances of the Philadelphia cordwainers and the Cambridge tailors. The wages of the tailors were fixed by statute, and the conspiracy necessarily had as its object the contravention of a positive law. Even though the indictment in the case of the Cambridge tailors did not specify that the defendants acted contrary to statute ("contra formam statuti"), the existence of the statute was nevertheless dispositive of the result. Rodney explained as follows:

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75. *Id.* at 68. Hopkinson also observed that there was some misconception concerning the purpose of the action. It was not commenced from "any private pique, or personal resentment, but solely, with a view, to promote the common good of the community: and to prevent in future the pernicious combinations, of misguided men, to effect purposes not only injurious to themselves, but mischievous to society." *Id.* at 67.

76. *Id.* at 140.

77. *Id.* at 141. The journeyman tailors case involved the issue of the sufficiency of an indictment. The defendants were convicted for demanding higher wages than were specified by statute. It was held that "the omission in not concluding this indictment *contra formam statuti* is not material, because it is for *a conspiracy*, which is an offence at common law." The King v. Journeymen Tailors of Cambridge, 88 Eng. Rep. 9, 10 (1721), *reprinted in* K. WEDDERBURN, CASES AND MATERIALS ON LABOUR LAW 371-72 (1967) (emphasis in original).

78. 3 DOCUMENTARY HISTORY, *supra* note 1, at 190.

> Whenever a statute directs a particular measure, or establishes any regulations, without prohibiting in express terms, the violation of them, and prescribing a punishment, any party contravening such regulations, is by the common law subject to indictment; and the indictment is, technically speaking, styled an indictment at common law. I will readily admit, that where persons combine to accomplish an unlawful object, that is the true distinction, whether that object be unlawful at common law, or rendered so by statute . . . .[79]

Accordingly, an indictment properly might be brought at common law based on the intended violation of statutory provisions; only in that sense did English authority support the common law offense of a conspiracy to raise wages.

The Recorder presiding over the case, Moses Levy, instructed the jury regarding the law of the case. Levy's charge incorporated the broadest definition of conspiracy found in any of the cases. He stated as follows: "A combination of workmen to raise their wages may be considered in a two fold point of view: one is to benefit themselves . . . the other is to injure those who do not join their society. The rule of law condemns both."[80] He further cautioned the jury that they were to apply the rule regardless of whether they understood it, for their understanding was limited: "As well might a circle of a thousand miles diameter be described by the man, whose eye could only see a single inch, as the common law be characterized by those who have not devoted years to its study."[81] He assured the jury, however, that "there is often great reason for an institution, though a superficial observer may not be able to discover it."[82] Concerning the purely legal issue of the content of the common law rule, Levy thus simply informed the jury that there did exist a principle of law that they were obligated to apply, regardless of their understanding of that principle. Levy's hostility and bias toward the workers is routinely noted by scholars.[83]

With regard to the second analytical category involving the ideological content of the conspiracy doctrine, the prosecution sought to evoke a vision of community that was dependent on the individual's freedom to acquire and dispose of property. Equality and autonomy

79. *Id.* at 194.
80. *Id.* at 233.
81. *Id.* at 232.
82. *Id.* at 233.
83. For example, Turner analyzed the conspiracy prosecutions using "judicial hostility" as an explanatory factor. Examining Levy's rulings and charge in the trial, she concludes that he promoted conviction of the defendants. M. TURNER, *supra* note 46, at 39-42.

therefore consisted of "no more than the provision of means whereby individuals might constitute and regulate their own lives and property through the medium of contract."[84] In contrast, the defense depicted a communal prosperity based on the contributions of the working class and their collective pursuit of fair economic reward and social status.

Explaining the rationale that would justify the American adoption of the asserted English precedent, prosecuting attorney Hopkinson emphasized the distinction between individual and concerted activity and framed the terms of the debate around the concept of communal liberty. He stated as follows:

> This prosecution contravenes no man's right, it is to prevent an infringement of right; it is in favour of the equal liberty of all men, this is the policy of our laws; but if private associations and clubs, can make constitutions and laws for us . . . if they can associate and make bye-laws paramount, or inconsistent with the state laws; What, I ask, becomes of the liberty of the people, about which so much is prated; about which the [defense] counsel made such a flourish![85]

"Liberty" was thus limited to the pursuits of the individual worker acting in isolation from his fellows, and that limitation was imposed for the benefit of the community.

An association of workers, the prosecution continued, could "undertake to regulate the trade of the city," thereby interfering with the rights of all citizens. The interests of the community were effectively safeguarded by the masters' resistance to wage demands. As Hopkinson remarked to the jury, "It must be plain to you, that the master employers have no particular interest in the thing . . . if they pay higher wages, you must pay higher for the articles. They, in truth, are protecting the community."[86] In addition, to the extent

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84. C. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICAN, 1880-1960 (1985). Tomlins summarizes the debate concerning the nature of "liberty" and "independence" as follows:

> To many of the revolutionary generation, the liberty and independence which they celebrated had promised the establishment of conditions which would enable free men to contract with one another on a basis of real equality by guaranteeing their economic and social independence. For others, however, a revolution fought in behalf of liberty and property necessarily sanctified the liberty of individuals to use their property *productively*, free from the restraints of collective regulation. To the latter, that is, revolutionary liberty stood for liberty of industry — entrepreneurial license.

Id. at 34-35 (emphasis in original).

85. 3 DOCUMENTARY HISTORY, *supra* note 1, at 135.

86. *Id.* at 136-37.

that the society coerced individual members into conformity with the majority's will, it denied the individual his rights of independence and liberty. In one particularly rhetorical passage, Hopkinson depicted the plight of the recalcitrant worker who refused to abide by the rules of the society. The "dogs of vigilance," he said, "chase him from shop to shop; they allow him no resting place, till he consents to be one of their body; he is expelled [from] society, driven from his lodgings, proscribed from working; he is left no alternative, but to perish in the streets, or seek some other asylum on a more hospitable shore."[87] Therefore, he admonished the jury, combinations were to be condemned from a "double point of view" — first, based on "the general policy, as it relates to the good of the community, and the flourishing state of our manufactures," and secondly, from the perspective of "the liberty of individuals, and the enjoyment of common and equal rights, secured by the constitution and laws."[88]

For the defense, Franklin and Rodney emphasized in their arguments that the litigation was motivated by class antagonism. Referring to Smith's *Wealth of Nations*, Franklin argued that workers naturally combined to increase their wages just as masters naturally conspired to lower them. In such contests, masters would normally retain the advantage because they "could generally live a year or two upon the stocks which they have already acquired."[89] Rodney elaborated the theme by pointing out that the combination of masters had as its object only the greater exploitation of labor and attendant profit, and he cautioned that the consequences would be injurious to the community. The masters, he said, "are not satisfied with the rapid rate at which they are amassing wealth. They wish to make their fortunes by a single turn of the wheel." Lower wages would not in fact result in lower prices, but would merely force skilled artisans to seek work in other cities. He warned the jury that labor would not be cheaper as a result of conviction, but would rise in value "in exact proportion to the scarcity of hands." He also prophesied that "[t]hose workmen who are not chained to the spot, will fly the city . . . ."[90] Concluding, Rodney reminded the jurors that they were afforded "a constitutional power to decide the fact

87. *Id.* at 139-40.

88. *Id.* at 142.

89. *Id.* at 151; *see also* 1 A. SMITH, THE WEALTH OF NATIONS 83-84 (R.H. Campbell, A.S. Skinner & W.B. Todd eds. 1976) ("Of the Wages of Labour").

90. 3 DOCUMENTARY HISTORY, *supra* note 1, at 198, 202. Rodney's argument, *see id.* at 198-202, is a forceful statement of the opposing economic interest at stake. Underlying his analysis is the view that labor is "the source from whence the golden streams flow." *Id.* at 202.

and the law,"[91] despite Levy's intimation to the contrary.

Closing for the prosecution, Ingersol reiterated the injury done to nonmembers of the society, to the masters, and to the community; such consequences, he said, rendered the defendants' acts unlawful. The complaint against the defendants was simply stated as follows: "Last October or November, in conformity with this article of the [society's] constitution, they entered into an agreement to obtain an advance of wages, and to punish, as heretofore stated, all who shall contravene this regulation."[92] Even assuming no aggravating facts were proved, Ingersol argued, the indictment fell within the accepted legal definition of an unlawful conspiracy: " 'Every confederacy to injure individuals, or to do acts which are unlawful or prejudicial to the community, is a conspiracy.' "[93] As to the masters, they suffered from combinations of workers because they could not afford to retain a nonmember of the society at the risk of losing the other journeymen. There was an interference with the rights of the individual worker to support or not support the society. Last, the combination was "a measure highly prejudicial to the community" and threatening to the domestic manufacture of shoes.[94]

Levy's instruction to the jury recapitulates the ideological thrust of the conspiracy doctrine. Initially, he legitimized the institutional process by which the shoemakers were to be oppressed. America, he said, was a country in which the rule of law was supreme, and "the will of no individual ought to be, or is admitted, to be the rule of action."[95] Because courts administered the rule of law in a neutral manner, they ineluctably commanded the allegiance and obedience of all citizens. Levy instructed the jury as follows:

> The moment courts of justice loose their respectability from that moment the security of persons and of property is gone. The moment courts of justice have their characters contaminated by a well founded suspicion, that they are governed by caprice, fear or favour; from that moment they will cease to be able to administer justice with effect, and redress wrongs of either a public or private nature. Every consideration, therefore, calls upon us to maintain the character of courts and juries; and that can only be maintained by undeviating integrity, by an adhesion to the rules of law, and by deciding impartially in con-

91. *Id.* at 204.
92. *Id.* at 209.
93. *Id.* at 210 (citing 4 Christian's Black. 136 n. 4).
94. *Id.* at 214.
95. *Id.* at 224.

formity to them.[96]

By such statements, Levy sought to convince the workers, the jurors, and the public of the legitimacy of the judicial proceeding.

Concerning the common law, Levy adopted a strategy of reification through which the reality of the actual experience was subsumed and distorted within a communicated reality. He described the common law in the following idealized terms so as to reconcile any perceived contradiction between existing social conditions and revolutionary aspirations voiced by the workers:

> An attempt has been made to shew that the spirit of the revolution and the principle of the common law, are opposite in this case. That the common law, if applied in this case, would operate an attack upon the rights of man. The enquiry on that point, was unnecessary and improper. Nothing more was required than to ascertain what the law is. The law is the permanent rule, it is the will of the whole community. After that is discovered, whatever may be its spirit or tendancy, it must be executed, and the most imperious duty demands our submission to it.[97]

Levy thus controverts the validity of the workers' arguments by denying there can be any opposition between ideals of liberty and equality and the rule of law. Indeed, "law" so fully engulfs the universe of social relations that it precisely corresponds with the consensual nature of communal existence and embodies the definition of freedom itself.[98] It is therefore possible to accept the legal order because "the legal order substitutes a harmonious abstract experience for the concrete alienation that characterizes [the individual's] lived experience."[99]

The policy underlying the common law rule was based on Levy's version of the economic system of the community. He portrayed the cordwainers as a class having distinct interests antithetical to the interests of the world at large. Combination, in other words, was an "unnatural, artificial means of raising the price of

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96. *Id.* at 224-25.

97. *Id.* at 225.

98. In his codification of the common law, Blackstone posited law as the institutional force mediating the "fundamental contradiction" between the autonomy of the individual human and the power of the sovereign government. *See* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209, 372-82 (1979). Here, Levy identifies law as the "will of the community" and denies that there can be any conflict between law and the "rights of Man." Whatever is "discovered" to be law is necessarily compatible with ordered civil society.

99. Gabel, *Reification in Legal Reasoning*, 3 RES. IN LAW AND SOC. 25, 26 (1980).

work beyond its standard, and taking an undue advantage of the public."[100] The shoemakers' society oppressed those journeymen in indigent circumstances by preventing them from earning even the lower wages offered by the masters, thereby further impoverishing them. As Levy observed for the edification of the jury, "A father cannot stand by and see, without agony, his children suffer; if he does, he is an inhuman monster; he will be driven to seek bread for them, either by crime, by beggary, or a removal from the city."[101] Ultimately, Levy theorized, the power exercised by a combination of workers would jeopardize the foundations of our economic system. If the journeymen were permitted to turn out against the masters, "they might raise the price of boots to thirty, forty, or fifty dollars a pair, at least for some time, and until a competent supply could be got from other places."[102] The obvious conclusion for Levy was that "[i]n every point of view, this measure is pregnant with public mischief and private injury . . . tends to demoralize the workmen . . . destroy the trade of the city, and leaves the pockets of the whole community to the discretion of the concerned."[103] It was also contrary to the "spirit of '76," which promised liberty under duly enacted law and not "a new legislature consisting of journeymen shoemakers."[104]

B. New York Cordwainers

In the decade following the conviction of the Philadelphia cordwainers, there were two other important prosecutions that significantly contributed to the development of the conspiracy doctrine. The *New York Cordwainers* case[105] in 1810 was initially argued as a motion to quash the indictment, and it affords the most comprehensive analysis of the law of conspiracy during the period. The *Pittsburgh Cordwainers* case,[106] decided in 1815, is a useful illustration of the evolution and solidification of the doctrine.

The indictment in *New York Cordwainers* alleged the unlawful formation and conduct of a society of workers. Once in existence,

100. 3 DOCUMENTARY HISTORY, *supra* note 1, at 228.
101. *Id.* at 230.
102. *Id.*
103. *Id.*
104. *Id.* at 235.
105. The case was reported by William Sampson, counsel for the defendants. That report is reprinted in 3 DOCUMENTARY HISTORY, *supra* note 1, at 251. The official report is People v. Melvin, 2 Wheeler 262 (1810).
106. Commonwealth v. Morrow (Court of Quarter Sess. Allegheny Cty. 1815 4 DOCUMENTARY HISTORY, *supra* note 1, at 15.

according to the charge, the society demanded wage increases from the respective masters, and it was further agreed that no member of the society would work for a master who employed nonmembers or who would not accept certain other terms demanded by the society. In addition, it was charged that the society injured one Edward Whitess by preventing him from following his trade as a shoemaker.

William Sampson argued the motion on behalf of the defendants to quash the indictment. Tracing the law of conspiracy to its British origins, Sampson distinguished the offences of conspiracy, champerty, and maintenance, all of which were subsumed under the generic term of "conspiracy." Those offenses, Sampson argued, depended on the existence of positive law and could not be enforced without statutory authority. He inquired whether there was controlling public law in force in New York and concluded as follows:

> The silence of our statutes, the silence of our records, shows that there is none; and the definition in affirmance of the common law, shows that there could be none; and that even in England, there never was any other than those statutes of labourers, which it is not pretended ever were of force in this country, and which are all repealed if they ever had been in force here.[107]

In any event, Sampson asserted, the British statutes were class-based in origin and as a consequence of those statutes, "the most useful class in England is rendered the most miserable, and grows poor as its oppressors grow rich."[108] Because American judges had discretion to accept or reject British law, such precedent should not be binding, even assuming the prosecution's statement of it had been accurate.

Concerning the authority of the *Philadelphia Cordwainers* precedent, Sampson mounted an extensive challenge to Levy's reasoning in the case. First, Sampson controverted the applicability of British law, which Levy had accepted. While some portions of the common law remained in force, Sampson agreed, no part that was not consistent with ideals of the Revolution could survive. He commented,

> In Philadelphia, the recorder says, you shall not even inquire whether the act in judgment is or is not an attack upon the rights of man. But the constitution of this state is founded on the equal rights of men, and whatever is an attack upon these rights is contrary to the constitution.[109]

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107. 3 DOCUMENTARY HISTORY, *supra* note 1, at 260-61.
108. *Id.* at 262.
109. *Id.* at 279.

Thus, Sampson concluded that regardless of its doctrinal validity, the Philadelphia case was inappropriate to the ideals of American democracy.

Next, Sampson reviewed Levy's interpretation of the law of conspiracy and criticized Levy's misunderstanding of that law. The passage from Hawkins, the British authority on which Levy relied, was in Sampson's view incorrectly stated. According to Sampson, Hawkins had referred in his treatise to a common law conspiracy to falsely charge a third person as the father of a bastard child, which fell within the statutory proscription of false accusations. Sampson therefore concludes, "The notion that confederating to do any thing indirectly tending to impoverish a third person, is indictable at common law, is so puerile a mistake, that I feel distressed to be under the necessity of exposing it."[110] He pointed out that the term "indirect" reflected a corruption of the French *droit*.[111] Despite its appearance in some reports, Sampson said that "there is no adjudged case where any act has been held indictable as a conspiracy at common law, whereof the essence . . . has not been falsehood, oppression, or unlawful maintenance, in some sort or other . . . ."[112]

As to the form of the indictment, Sampson acknowledged that British cases were indictable "at common law." Yet those indictments had a necessary connection with statutory law. Sampson explained that "[w]hen an offence is created by statute, and the statute gives no particular penalty, the indictment not only may, but must, be laid at common law, and a general judgment will be given, as of a misdemeanor at common law."[113] That legal technicality, however, did not prove that a conspiracy charge could be maintained in the absence of a statute.

Summarizing his position, Sampson reiterated that two principles governed the law of the case. The first was that "a conspiracy to do any act, is not indictable unless the act to be done is indictable." Second, "it must appear upon the fact of the indictment that the act to be done is unlawful" or a showing of such circumstances must be contained in the indictment.[114] Because the defendants agreed only that they would not work with any journeyman not a member of the society nor under certain prices, no unlawful act was alleged or

110. *Id.* at 281.

111. "Droit" is defined as follows: "In French law, right, justice, equity, law, the whole body of law; also a right." BLACK'S LAW DICTIONARY 445 (5th ed. 1979).

112. 3 DOCUMENTARY HISTORY, *supra* note 1, at 283.

113. *Id.* at 292.

114. *Id.* at 295.

shown. Even had defendants conspired to raise their wages, such a conspiracy was not unlawful unless there was a statute fixing wages.

Prosecuting attorney Emmet countered that the common law had been adopted in New York and, in addition, the common law rule prohibited the shoemakers' combination. After reviewing the pertinent precedent, including the case of the Cambridge tailors, Emmet advanced the proposition that "either a conspiracy unlawfully to prejudice other individuals, or the public at large, is an offence."[115] No statute, he argued, was necessary to make out the offence when the conspiracy inured to the " 'great impoverishment of the people,' " such as a conspiracy to sell wool only for a fixed price.[116] In a statement that exemplifies the ideological strategy of dissimulation, Emmet articulated the policy rationale for prohibiting combinations of workers. His argument succinctly asserts the interests of the community as opposed to the interests of the working class, and the interests of the individual worker as opposed to the interests of the group:

> Individual rights are sufficiently secured by letting every man, according to his own will, follow his own pursuits, while public welfare forbids that combinations should be entered into for private benefit, by the persons concerned in any employment connected with the general welfare; in which combinations they would make common cause against the community at large; and in which the individual rights of those in the combining classes, who may wish to be industrious, are most grievously violated; because, if they were permitted to follow their pursuits, it would tend to relieve society from the extortions of the conspirators. These combinations are an infringement of that tacit compact which all classes reciprocally enter into, that when they have partitioned and distributed among them the different occupations conducive to general prosperity, they will pursue those occupations so as to contribute to the general happiness; and they are therefore at war with public policy.[117]

Emmet's cogent formulation captures the essential ideology of the conspiracy doctrine before *Hunt*.

Following the arguments on the motion to quash, the matter was continued until the next session. Mayor DeWitt Clinton, the presiding official, was absent in the February session, and no judgment was rendered. Before the April session, Clinton left office, and

115. *Id.* at 324.
116. *Id.* at 326-27 (quoting Liber Assisarum, 27 Edw. III 138, 139).
117. *Id.* at 329.

the new presiding officer, Jacob Radcliff, declared that he could not issue an opinion because he had not heard the argument. There were further delays, and it was determined to set the case for trial in July 1810.[118] As a result, the question was submitted to a jury rather than decided as a matter of law by the court.

At the trial, Sampson pointed out that the defense had conceded all the facts charged in the indictment, and he viewed the question to be "founded upon the law." Sampson, however, was unable to reiterate his previous argument in its length and complexity under the existing conditions, "at candle light, with sight so fatigued, and faculties so exhausted, and in a state of health so ill suited to exertion."[119] The prosecution emphasized in the closing argument that the jurors, even though they had power to decide law and fact, were not competent to resolve the convoluted legal principles surrounding the doctrine. Those "abstruse deductions" from ancient precedent were beyond their capacities:

> [I]t never could be expected from the most intelligent jurors that ever were empannelled, that they should, in the accidental discharge of a duty for which they had no previous course of preparation, follow the ablest and clearest logician through a range of argument which it must have cost a practiced and educated lawyer so much time and trouble to compose.[120]

Therefore, the jurors were to be guided in the law by the instructions of the presiding official.

Radcliffe's charge to the jury promoted conviction.[121] In unequivocal terms, he stated that English common law did apply in New York: "Our immediate ancestors claimed it as their birthright."[122] Radcliffe summarized the legal principle as a two-part analysis indistinguishable in content from Shaw's later formulation in *Hunt*. According to Radcliffe, conspiracy was to be considered from a dual aspect: "the one [point of view] where there existed a combination to do an act, unlawful in itself, to the prejudice of other persons; the other where the act done, or the object of it, was not unlawful, but unlawful means were used to accomplish it."[123] To insure that the

118. Under the circumstances, defense counsel chose to waive their motion to quash. *Id.* at 361-62.

119. *Id.* at 373.

120. *Id.* at 380.

121. Turner says of Radcliffe's charge to the jury that his reasoning "leaves little doubt that the judge was promoting conviction, particularly in view of the fact that the defense was based mainly on the non-applicability of the English law." M. TURNER, *supra* note 46, at 43.

122. 3 DOCUMENTARY HISTORY, *supra* note 1, at 383.

123. *Id.* at 382.

jurors were cognizant of the "facts" of the case, Radcliffe instructed that "[w]hatever might be the motives of the defendants, or their object, the means thus employed were arbitrary and unlawful" and fell within "one of the descriptions of the offence which had been given."[124] The defendants were duly convicted.

C. *Pittsburgh Cordwainers*

By the time of the *Pittsburgh Cordwainers* case[125] in 1815, the legal discourse had become an arena for explicit policy debate regarding the welfare of the community. The theme emphasized by Emmet in the *New York Cordwainers* prosecution now appeared as a matter of course in the indictment. The defendants in the Pittsburgh case were alleged to have conspired to raise their wages and to refuse work from any master employing journeymen who were not members of the society. Further, according to the indictment, Pittsburgh "for a long time past has been a large trading and manufacturing town," and it was alleged that "great sums of money have been acquired by the skill, industry and enterprize of the master cordwainers of said borough," which tended to "the wealth, improvement, and prosperity of the said borough, and the inhabitants thereof."[126] Knowing that, the complaint averred, the journeymen confederated together to do acts that impoverished masters and citizens alike.

For the defendants, Walter Forward reviewed the English precedent and argued as Rodney and Sampson had argued that the offense of conspiracy depended on the existence of a statute or on the fraudulent support of another's claim. As to the policy of the law, Forward depicted the purpose of the Pittsburgh case as economic warfare against the journeymen: "The prosecution was instituted notoriously on the ground of their demanding higher wages; it followed on the heels of the late turn-out, it would have vanished on their acceptance of the former prices; its object is therefore manifest, and can be neither disguised nor denied."[127]

The wage demands of the journeymen, Forward calculated, were negligible in comparison to the profit of the masters. He deduced that the return on capital to the masters amounted to "at least seventy-five percent per annum." A pair of cossacks, for example,

124. *Id.* at 385.

125. Commonwealth v. Morrow (Court of Quarter Sess. Allegheny Cty. 1815), in 4 DOCUMENTARY HISTORY, *supra* note 1, at 15.

126. 4 DOCUMENTARY HISTORY, *supra* note 1, at 21.

127. *Id.* at 66.

cost $8.75 to produce and were sold for $11.00, often for cash in hand.[128] Under such circumstances, the society could hardly be regarded as oppressive. Indeed, Forward claimed, the society benefitted the journeymen in the following respects: "it enabled them to meet the employers on a footing of equality; protected the stranger from imposition; promoted mutual kindness, and gave a home to the disabled and the sick."[129] There was not, Forward concluded, any unlawful injury to employers or nonmember journeymen.

Samuel Roberts, presiding over the court, instructed the jury in a manner clearly favoring defendants' conviction. Addressing the point of class conflict, Roberts deflected the jury from any possible identification with the economic plight of the defendants. He acknowledged that on the one hand there were a number of journeymen "whom we are led to regard as poor men," and on the other hand were the masters, "some of whom are represented as wealthy." There was a tendency, he said, for the jurors to view the evidence "as if the true question were, whether the journeymen were the oppressed, and the masters the oppressors — whether the profits of the one class be not too great, and the remuneration of the other inadequate." He thus cautioned the jury that they were to have nothing to do "with the regulation of wages, or the profit of the one or the other."[130] Roberts continued with an incisive recapitulation of the ideological themes of the conspiracy doctrine:

> It is not for demanding high prices that these men are endicted, but for employing unlawful means to extort those prices. For using means prejudicial to the community. Confederacies of this kind have a most pernicious effect, as respects the community at large. They restrain trade: they tend to banish many artizans, and to oppress others. It is the interest of the public, and it is the right of every individual, that those who are skilled in any profession, art, or mystery, should be unrestrained in the exercise of it. It is particularly the interest of a trading and manufacturing town (such as Pittsburg) that such freedom should exist.[131]

To insure that the jurors were not misled regarding the application of the law, Roberts reviewed the charges against the defendants and related those facts to the legal doctrine. He stated, "A conspir-

128. *Id.* at 66-67.
129. *Id.* at 68.
130. *Id.* at 80-81.
131. *Id.* at 81.

acy to compel men to work, at certain prices, is doubtless endictable. [Likewise], a conspiracy to compel an employer to hire only a certain description of persons, is endictable." It was also unlawful "to conspire to compel men to become members of a particular association, or to contribute towards it."[132] There was an abundance of evidence to support each point, Roberts stated. In conclusion, he posed the following question to the jury: "put this question to yourselves 'from the evidence we have heard are we satisfied, that the defendants did confederate together by indirect means to impoverish or prejudice a third person, or to do acts unlawful or prejudicial to the community?' "[133] Presented with that instruction, the jury found the defendants guilty.

D. Subsequent Cases

Between the *Pittsburgh Cordwainers* case in 1815 and *Commonwealth v. Hunt* in 1842, there were fourteen additional conspiracy litigations.[134] The definition of the offense during this period was generally a matter of consensus among the parties. Joseph Ingersoll, acting for the prosecution in the *Twenty-Four Journeyman Tailors* case[135] of 1827, for example, concluded his survey of precedent with a remark indicating that the legal principle was not in dispute. He stated as follows: "But why search for definitions among the books, when the candour of the [defense] counsel has furnished one at least as comprehensive as any that they afford? 'A conspiracy,' he is willing to admit, 'is an agreement to do an unlawful act, or a lawful act by unlawful means.' "[136] The defendants, the jury found in the case, had unlawfully engaged in injuring and oppressing a third party.[137] As Ingersoll's formulation indicates, the means-end test was a recognized doctrinal element of conspiracy.

Significantly, one of the salient departures from the means-end distinction appears in the opinion of Chief Justice Savage of the Su-

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132. *Id.* at 82.

133. *Id.* at 86-87.

134. M. TURNER, *supra* note 46, at 2, lists fifteen cases, but one of those involves a suit brought by a worker against his employer. The earliest compilation of cases was prepared by Nelles, *Commonwealth v. Hunt*, *supra* note 46, at 1166-69.

135. Commonwealth v. Moore (Mayor's Court Phila. 1827), in 4 DOCUMENTARY HISTORY, *supra* note 1, at 99.

136. 4 DOCUMENTARY HISTORY, *supra* note 1, at 232. Ingersoll pointed out that the issue of the legality of a conspiracy to raise wages remained questionable. However, he said, "it never was doubted that other combinations — such for example as this [case], to oppress and ruin, which is imputed to the present defendants — were highly criminal." *Id.* at 233.

137. The offense was thus identical to the offense alleged in the *Hunt* indictment. The charge to the jury is set forth *id.* at 247-64.

preme Court of New York in *People v. Fisher*.[138] In *Fisher*, the journeymen shoemakers agreed that they would not make coarse boots for less than one dollar per pair. A journeyman named Pennock performed work for Lum, a master, below the price; the other shoemakers turned out against Lum and subsequently were charged with unlawful conspiracy. The court of general sessions dismissed the indictment, ruling that it did not describe an offense "known to and recognized by the state."[139]

Reversing the lower court, Chief Justice Savage referred to a New York statute prohibiting conspiracies that were injurious "to trade or commerce." A conspiracy to raise wages, he held, fell within the proscription. Savage concluded that the common law prohibited conspiracies even for a lawful end and cited the report of the *Journeymen Tailors* in 8 *Mod.* as support for that proposition. Consequently, the conspiracy was unlawful by virtue of its impact on the public, and it was unnecessary to examine the specific means by which the object was sought. Savage explained his conclusion in terms of the communal welfare:

> It is important to the best interests of society that the price of labor be left to regulate itself, or rather be limited by the demand for it. Combinations and confederacies to *enhance* or *reduce* the prices of labor, or of any articles of trade or commerce, are injurious. They may be oppressive, by compelling the public to give more for an article of necessity or of convenience than it is worth; or on the other hand, of compelling the labor of the mechanic for less than its value.[140]

Savage's reasoning was followed the next year by Judge Edwards in *Twenty Journeymen Tailors*[141] when he found the defendants guilty of an unlawful conspiracy and imposed fines totalling $1,150 against them. In the sentencing, Edwards observed as follows: "Every American knows, or ought to know, that he has no better friend than the laws, and that he needs no artificial combination for his protection."[142] The citizens of New York, in response, hanged Savage and Edwards in effigy.[143]

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138. 14 Wend. 9 (1835).

139. *Id.* at 12.

140. *Id.* at 19. In Savage's view, combinations interfered with the "market" economy. Wages were properly regulated by the demand for an article, provided that they were not enhanced by the "forced and artificial means" of conspiracy. *Id.*

141. People v. Faulkner (1836), in 4 DOCUMENTARY HISTORY, *supra* note 1, at 315.

142. *Id.* at 330-31.

143. Witte, *supra* note 46, at 827; *see also* C. TOMLINS, *supra* note 84, at 39.

That same year, 1836, a group of shoemakers in Hudson, New York, were acquitted of conspiracy in an indictment brought under the statute.[144] The legal rule propounded by Savage and Edwards was vigorously debated, and the earlier version of the conspiracy doctrine protecting lawful objectives and methods was reaffirmed in its essentials. The Hudson shoemakers allegedly conspired to raise their wages, to punish any member who broke the society's rules, and to refuse to work for any master who employed a nonmember. The allegations were thus materially indistinguishable from those in *Fisher*.

Arguing for the defense in the Hudson case, John Edmonds interpreted *Fisher* to signify that a conspiracy to raise wages was unlawful even though both ends and means were lawful. Edmonds criticized Savage's reliance on the authority of 8 *Mod.* as being misconceived and erroneous, and he raised once again the point that the English law in the case of the Cambridge tailors was based on a statute. He insisted that the correct law, as set forth by the New York Court of Errors, defined a conspiracy to be "a combination of two or more, to obtain an unlawful end by lawful means or a lawful end by unlawful means."[145] The necessary but incorrect principle underlying *Fisher*, according to Edmonds, was that an agreement to seek a lawful end was rendered unlawful by the combination itself. As to the purported injury to the community, Edmonds argued that the drafters of the New York statute did not intend to proscribe labor disputes. A strike against one master did not harm the public because "other masters sold more. The same numbers were made and consumed."[146] Edmonds' arguments prevailed in the case.

As the foregoing analysis demonstrates, the means-end approach was a common feature of the conspiracy cases which preceded *Hunt*. Moreover, the basic factual pattern was reiterated in every case: workers demanded higher wages and better working conditions and sought to obtain those demands through sanctions against obdurate masters and recalcitrant fellow journeymen. What occasionally did vary was the application of the law to the facts,

144. *See* People v. Cooper (N.Y. Ct. of General Sess. 1836), in 4 DOCUMENTARY HISTORY, *supra* note 1, at 277.

145. 4 DOCUMENTARY HISTORY, *supra* note 1, at 300. Edmonds refers to the decision of the Court of Errors in People v. Lambert, 9 Cow. 578. *See id.*

146. 4 DOCUMENTARY HISTORY, *supra* note 1, at 306. Regarding "market" forces, Edmonds argued that "[i]f the journeyman tailors, by means of their combinations, get the prices of their work so high that we cannot afford to pay them, we shall not go without clothes, we shall make them ourselves as you do now and for the same reason, because it is our interest to do so . . . ." *Id.* at 307.

which was influenced by the judicial official presiding over the case. *Hunt* nevertheless was a significant departure from its predecessors. Most importantly, it introduced a new ideology into the discourse of employment relations by substituting a view grounded on "contract" for the previous concern with community and social policy.

V. The *Hunt* Decision and Its Aftermath

The allegations against the shoemakers in *Commonwealth v. Hunt*[147] were materially identical to those in the Philadelphia, New York, and Pittsburgh cases. The defendants were charged with conspiring to form a society to govern themselves and other workmen, to "extort great sums of money by means thereof," and to refuse to work for any master who employed a nonmember journeyman. Specifically, the defendants allegedly compelled Wait, a master, to turn out Horne, a journeyman who refused to pay a penalty assessed by the society. The defendants were found guilty at the municipal court level.[148] On appeal to the Massachusetts Supreme Court, the dispositive issue involved the sufficiency of the indictment. Robert Rantoul, Jr., counsel for the defense, argued that the indictment failed to set forth "any agreement to do a criminal act, or to do any lawful act by criminal means"[149] and, consequently, that the jury should have been instructed that there was no indictable offense.

In his opinion, Shaw commenced his analysis with the following definition of an unlawful conspiracy: it is "a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means."[150] From that

147. 45 Mass. (4 Met.) 111 (1842).

148. The proceeding in the lower court is reported in Thacher's Criminal Cases 609 (1840). In his charge to the jury, Judge Thacher stated as follows:

> This case is as important in principle as any one which was ever tried in this court. I think, that we have all attended to it with diligence, and without prejudice. I am of opinion, and it is my duty to instruct you, as a matter of law, that this society of journeymen bootmakers, thus organized for the purposes described in the indictment, is an unlawful conspiracy against the laws of this commonwealth. It is a new power in the state, unknown to its constitution and laws, and subversive of their equal spirit. If such associations should be organized and carried into operation through the varying grades, professions and pursuits of the people of this commonwealth, all industry and enterprise would be suspended, and all property would become insecure. It would involve in one common, fatal ruin, both laborer and employer, and the rich as well as the poor. It would tend directly to array them against each other, and to convulse the social system to its centre.

Id. at 653-54.

149. 45 Mass. (4 Met.) at 114.

150. *Id.* at 123.

definition, Shaw concluded, it followed that a sound indictment must set forth specifically either the unlawful purpose of the conspiracy or the unlawful means by which a lawful purpose was to be accomplished. Such, he said, was "the result of the English authorities, although they are not quite uniform."[151]

Proceeding to the actual case, Shaw noted that Judge Thacher in the lower court had refused to declare the indictment invalid and had, instead, instructed the jury that the conspiracy had an unlawful act as its objective and that defendants intended to effect the unlawful objective by unlawful means. Based on the contents of the indictment, Shaw found the charges to consist of a single averment, "that the defendants and others formed themselves into a society, and agreed not to work for any person, who should employ any journeyman or other person, not a member of such society, after notice given him to discharge such workman."[152] According to Shaw, such an allegation did not constitute a proper indictment.

Shaw observed that the intention of the Bootmakers Society was to "induce all those engaged in the same occupation to become members of it." That purpose was "not unlawful." Distinguishing between legitimate and "dangerous and pernicious" purposes, Shaw ruled that unlawful ends should be "specially charged," for the defendants might have had laudable objectives, such as the economic and moral support of its members. However, if there were a secret agreement concerning purposes "injurious to the peace of society or the rights of its members," then such a confederation would constitute an unlawful conspiracy.[153]

Continuing, Shaw held that the means chosen to effectuate the defendants' ends were not unlawful. The defendants were not bound by contract, but were "free to work for whom they please[d], or not to work." Likewise, Shaw noted, this was not a case in which the defendants sought the discharge of a person having a fixed contract with the master; consequently, there was no unlawful interference with a contractual relationship. Shaw also carefully excepted from his principle those situations in which an employment contract existed and a group of workers simultaneously terminated their employment.[154]

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151. *Id.* at 126.
152. *Id.* at 128.
153. *Id.* at 129.
154. Shaw stated as follows:

> Suppose a farmer, employing a large number of men, engaged for the year, at fair monthly wages, and suppose that just at the moment that his crops were

The allegation that defendants compelled Wait to discharge Horne did not state a criminal offense, Shaw concluded. Neither force nor fraud was alleged as an element of the compulsion. Shaw reiterated that the legality of defendants' conduct might have turned on a contractual relation between Wait and Horne; the "established principle," according to Shaw, was that "every free man, whether skilled laborer, mechanic, farmer or domestic servant, may work or not work, or work or refuse to work with any company or individual, at his own option, except so far as he is bound by contract."[155]

Regarding Horne's impoverishment through the actions of the Society, Shaw perceived no criminal impairment of Horne's rights. In significant contrast to the previous conspiracy prosecutions, Shaw does not discuss the injury to the community resulting from the loss of employment of a nonmember journeyman. Rather, Shaw poses a hypothetical situation to illustrate the benefit of competition in a free market society. If, for example, consumers of bread concertedly refuse to patronize a baker whose prices are excessive and solicit a rival baker to establish a bakery, the first baker may be impoverished through a conspiracy; nevertheless, Shaw continues, it is through competition that "the best interests of trade and industry are promoted."[156] Accordingly, a conspiracy to impoverish another is not of itself a criminal offense, provided the object is not effectuated by unlawful means.

Regarding the issue of the workers' demands for higher wages, necessarily implicit in the conspiracy doctrine, Shaw summarily dismissed the subject. Despite the fact that both parties raised arguments relating to the law of conspiracies to raise wages, he found that the indictment "[did] not aver a conspiracy or even an intention [by defendants] to raise their wages; and it appears by the bill of exceptions, that the case was not put upon the footing of a conspiracy to raise their wages."[157] Thus, according to Shaw, the decision in *People v. Fisher* was distinguishable on the ground that there was a statutory prohibition in that case against conspiracies injurious to

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> ready to harvest, they should all combine to quit his service, unless he would advance their wages, at a time when other laborers could not be obtained. It would surely be a conspiracy to do an unlawful act, though of such a character, that if done by an individual, it would lay the foundation of a civil action only, and not of a criminal prosecution.

Id. at 131. The implicit basis of the civil-criminal distinction is that a contract action is the appropriate sanctioning system for individual workers, while a criminal prosecution is suitable to punish collective activity.

155. *Id.* at 133.

156. *Id.* at 134.

157. *Id.* at 131-32.

trade or commerce, including conspiracies to raise wages. Based on the foregoing reasoning, Shaw determined that the indictment in the case did not charge a "criminal conspiracy punishable by law."[158]

Shaw's conclusion has evoked substantial disagreement among scholars on two major points. The first source of controversy concerns the extent to which, if at all, the *Hunt* decision modified the previous law of the conspiracy doctrine. Second, assuming that there was some modification of the doctrine, it is problematic that the law, so overtly pro-capitalist in earlier cases, should apparently benefit the working class. The anomaly is compounded by the fact that Shaw had just previously issued his decision in *Farwell v. Boston and Worcester Rail Road Corp.*,[159] which established common law principles significantly limiting compensation for injured workers.

Among the legal community, reaction to the *Hunt* case during the nineteenth century generally was tepid. While the case was mentioned by some treatise writers, others saw little of distinction in the decision, and several writers "ignored it completely."[160] Prosecutors and judges were indifferent to the opinion, and there were at least twenty-five conspiracy suits successfully prosecuted between the 1860's and the 1880's.[161] *Hunt*, then, was not perceived immediately to be a definitive judicial treatment of the conspiracy doctrine.

In his 1926 analysis of the *Hunt* case, Professor Edwin Witte discussed the misapprehension that *Hunt* overthrew "archaic doctrines" on which earlier cases were based.[162] To the contrary, Witte said, "[t]he unreported cases of the early nineteenth century did not turn upon the legality of the unions per se, but on the methods which they employed to gain their ends."[163] Witte further argued that in

158. *Id.* at 136.

159. 45 Mass. (4 Met.) 49 (1842). Horwitz analyzes the *Farwell* decision as follows:

> The doctrine of "assumption of risk" in workmen's injury cases expressed the triumph of the contractarian ideology more completely than any other nineteenth century legal creation. It arose in an economy which already had all but eradicated traces of an earlier model of normative relations between master and servants. And without the practice of enforcing preexisting moral duties, judges and jurists could no longer ascribe any purpose to legal obligations that were superior to the expressed "will" of the parties. As contract ideology thus emasculated all prior conceptions of substantive justice, equal bargaining power inevitably became established as the inarticulate major premise of all legal and economic analysis. The circle was completed; the law had come simply to ratify those forms of inequality that the market system produced.

M. HOROWITZ, *supra* note 68, at 210. Horowitz's insight applies with equal force to the *Hunt* decision.

160. Holt, *supra* note 46, at 642.

161. *Id.*

162. Witte, *supra* note 46, at 825.

163. *Id.* at 826.

only two cases, *Philadelphia Cordwainers* and *People v. Fisher*, were combinations to raise wages deemed unlawful. *Hunt* merely articulated with greater clarity "the distinction vaguely hinted at in [the] early cases," and, aside from that contribution, *Hunt* "seems to have had comparatively little effect upon the development of the law of labor combinations in this country."[164] Criminal conspiracy prosecutions continued into the 1880's, Witte notes.[165]

The first extended scholarly analysis of *Hunt* appeared in 1932.[166] In that study, Professor Walter Nelles concluded that *Hunt* changed prior law and proposed that the case could be explained in political terms as a contest between the Jeffersonian and Tory positions. He acknowledged the "paradox" that *Hunt* was "a seeming victory of Jeffersonianism in a Tory state and in the court dominated by the great but far from Jeffersonian Chief Justice Shaw."[167] In Nelles' view, Shaw was most heavily influenced by legislation pending before the Massachusetts legislature to protect the textile industry within the state. Nelles argued that by 1842, the American economy was sufficiently depressed that labor agitation was not a threat to employers; however, working class support was necessary to insure passage of protective tariffs. Evaluating the relevant political context, Nelles remarked as follows: "what has preceded suggests that the campaign for tariff protection may have had a larger share of responsibility for the decision of *Commonwealth v. Hunt* than the reasons stated in the opinion."[168] He added that the language of the opinion provided ample safeguards for employers, in that a combination to breach a contract of employment or to induce breach remained a criminal offense.[169] Shaw's "liberalism," accordingly, was a facade adopted to attain an explicit political objective.

In his study of Shaw's judicial career, Leonard Levy attempted to refute Nelles' thesis.[170] Levy claimed, first of all, that the case radically transformed the law of criminal conspiracy: "*Commonwealth v. Hunt* . . . is the Magna Carta of American trade-unionism, for it removed the stigma of criminality from labor organizations."[171] Levy's analysis of the case turns on Shaw's application of the law to the particular fact situation. For Shaw, a union's coercive

164. *Id.* at 828-29.
165. *Id.* at 828-32.
166. Nelles, *Commonwealth v. Hunt*, *supra* note 46.
167. *Id.* at 1130.
168. *Id.* at 1162.
169. *Id.*
170. *See* L. LEVY, *supra* note 46, at 183-206.
171. *Id.* at 183.

pressures on nonmember workers was within the acceptable limits of a competitive economy. Even though Levy concedes that courts before and after Shaw had found and would find identical activities to constitute both unlawful ends and means, he nevertheless describes the result reached by Shaw to constitute the "legal foundation of trade unionism."[172]

Levy rejects Nelles' theory regarding tariff legislation as inconsistent with the actual circumstances surrounding the litigation. He points out, "there is not the slightest evidence to suggest that Lemuel Shaw believed in protective tariffs."[173] Moreover, Levy asserts, Shaw was not simply a political pawn in some grand legislative design:

> Contrary to Professor Nelles, [Shaw's] decisions most definitely could not be dictated nor influenced by the fear of political consequences or of criticism, no matter how radical. He was the very man who would invite trouble for the sake of principle. His whole judicial career is evidence of supreme integrity built upon devotion to, even obsession with, principle.[174]

Consequently, Nelles' explanation is simply a "crude theory of judicial decision in which considerations of law are completely ignored."[175]

Levy, however, offers an interpretation of Shaw's decision that is likewise extraneous to the substantive legal merits of the case. According to Levy, there was popular sentiment in the early 1840's to codify the common law of Massachusetts. Leaders of the movement were radical Democrats such as Frederick Robinson and Robert Rantoul, Jr., the defense attorney in *Hunt*. The codificationists vigorously attacked the common law on the ground that it was an instrument of oppression under the control of the aristocracy and antithetical to the interests of the ordinary citizens; they urged legislative reform to reduce the power and discretion of judges.[176] Shaw, in con-

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172. *Id.* at 189.
173. *Id.* at 195.
174. *Id.* at 196.
175. *Id.*
176. *See, e.g.*, Rantoul, *Oration at Scituate, Masschusetts, 4 July 1836*, in READINGS IN AMERICAN LEGAL HISTORY 472 (M. Howe ed. 1949) [hereinafter READINGS]; Robinson, *On Reform of Law and the Judiciary in an Oration Delivered before the Trades Union of Boston and Vicinity, July 4, 1834*, in READINGS, *supra*, at 455. The criticisms of common law advanced by contemporary critical theorists, *see infra* text accompanying notes 195-198, were forcefully anticipated by Rantoul in 1836. He argued as follows:

> Judge-made law is special legislation. The judge is human, and feels the bias which the coloring of the particular case gives. If he wishes to decide the next case differently, he has only to distinguish, and thereby make a new law. The legislature must act on general views, and prescribe at once for a whole

trast, "cherished the traditional system." Levy continues as follows:

> To [Shaw] the common law was a science, founded upon pure reason and natural justice adapted to the conditions of society . . . . Life, liberty, and property were insured by it; stability and progress too. Its fixed principles, so intrinsically perfect and comprehensive, allowed for modifications in public policy and habit, yet maintained the necessary ingredients of duration and certainty.[177]

Given Shaw's convictions, Levy asserts, Shaw was committed to the defeat of the codification movement and drafted *Hunt* so as to demonstrate the fairness and neutrality of the common law, thus deflating the claims of the codificationists. Levy acknowledged that his interpretation of *Hunt* was "cautiously advanced," yet he concluded that the codificationists "lost their chief arguing point when Shaw handed down his opinion in *Commonwealth v. Hunt*."[178] Even though the codification movement had declined in impetus by 1842 and *Hunt* "was not a stake through the heart of codification," the case was nonetheless "another nail in the coffin."[179]

The codification view espoused by Levy, like Nelles' tariff explanation, invokes the process of legitimation. In short, Shaw arrived at a result that was not necessarily dictated by the internal logic of the case, but by the institutional requisites of the common law. *Hunt*, on that view, is consistent with Shaw's presumed class bias in favor of capitalist employers, because it strengthened the broad control of the judiciary over the legal relations of production.

In the most recent treatment of *Hunt* and the conspiracy doctrine, Wythe Holt advances a similar conclusion. He says, "Shaw did

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class of cases . . . .

The judge makes law, by extorting from precedents something which they do not contain. He extends his precedents, which were themselves the extension of others, till, by this accommodating principle, a whole system of law is built up without the authority or interference of the legislator . . . .

These objections to the common law have a peculiar force in America, because the rapidly advancing state of our country is continually presenting new cases for the decision of the judges; and by determining these as they arise, the bench takes for its share more than half of our legislation, notwithstanding the express provisions of the Constitution that the judiciary shall not usurp the functions of the legislature. If a common law system could be tolerable anywhere, it is only where every thing is stationary. With us, it is subversive of the fundamental principles of a free government, because it deposits in the same hands the power of first making the general laws, and then applying them to individual cases; powers distinct in their nature, and which ought to be jealously separated.

Rantoul, *supra*, at 475-78.

177. L. LEVY, *supra* note 46, at 198.

178. *Id.* at 199.

179. *Id.* at 202.

not stray from his class learnings, in intention, legal meaning or effect. Rather, he brilliantly solved a problem of ideology and legitimacy in the time-honoured common law tradition, using supposedly neutral rules to make labour law *seem* fair and evenhanded."[180] Holt refers to four specific respects in which the *Hunt* opinion furthered the interests of employers. First, Shaw established that the common law of conspiracy was in force in Massachusetts, and he expanded that law by holding that no overt act was necessary to the offense.[181] Second, Shaw made clear that conspiracies were punishable when they were instruments of "oppression or injustice."[182] Third, unions were prohibited from coercing uncooperative workers when such activity interfered with an employment contract.[183] Fourth, the language of the opinion insured that the labor conspiracy doctrine would not be applied to capitalist entrepreneurs, among whom competition was an unavoidable tendency.[184]

Holt concludes that the import of *Hunt* was largely ideological. The opinion did not preclude subsequent criminal prosecutions, but it did act to legitimate the common law system. The conspiracy doctrine, Holt argues, had become overtly class-biased and threatened to erode the legitimacy of judicial authority. Shaw consequently "was restoring the common law to an appearance of fairness," and the decision also meshed with "[t]he contractarian core of the emerging *laissez-faire* culture [that] demanded the appearance of an approximation of equality between bargainers."[185] Accordingly, the significance of the decision inheres in its social import rather than its development of legal principle.

From a doctrinal standpoint, the most careful treatment of *Hunt* is that of Marjorie Turner.[186] Her work provides a convenient summary of several significant points and a context for further analysis. Turner evaluates *Hunt* on the basis of three areas of inquiry. First, she asks, did the decision preclude the prosecution of labor

180. Holt, *supra* note 46, at 640 (emphasis in original).
181. *Id.* at 644.
182. *Id.* at 644-45.
183. *Id.* at 645-46. On this point, Holt notes:

> In an age of contractarianism, when the usual form of labour oppression was rapidly becoming that fiction of freedom and individualism embodied in the notion of contract, and when contracts were actually becoming much more useful in an economy increasingly concerned with commodities futures and with time and distance . . . Shaw had quite naturally sensed the organic needs of his culture.

Id. at 646.
184. *Id.* at 646-47.
185. *Id.* at 652.
186. M. TURNER, *supra* note 46, at 58-72.

organizations? Second, did it confer substantive rights on workers? Third, did the case legalize the closed shop or the right to strike? She concludes that the answer to each question is "no."[187] Far from affirmatively protecting union activities, Shaw more completely described the offense of conspiracy and formulated the conditions under which it could be prosecuted. Closed shops and strikes, for example, were deemed unlawful when the existence of "force or fraud" was alleged, or when the employer was induced to breach an employment contract. Thus, Turner concludes that "rather than upholding the closed shop or the right to strike, Shaw was really providing the rationale for their control."[188]

With regard to *Hunt* as judicial precedent, Turner found that in the ten-year period following *Hunt*, there were no conspiracy prosecutions; she does not accept, however, that the lack of such cases is attributable to the influence of *Hunt*. Continuing forward from the 1850's, Turner discusses a number of cases relying on *Hunt*. She summarizes the review as follows:

> Tallying the results thus far, I find only two labor cases citing *Commonwealth v. Hunt* as the basis for acquittal, and one of these was primarily on the issue of interfering with justice. On the other hand, I found eight labor cases in which either *Commonwealth v. Hunt* was an insufficient defense or was actually an aid to conviction. At least two other labor convictions were decided upon the authority of one of these eight. Thus I conclude from this survey that *Commonwealth v. Hunt* contributed more to the continued though modified use of the labor conspiracy doctrine than to its demise.[189]

Noting that *Hunt* had slight actual influence on legal doctrine, Turner nonetheless perceives that the decision did have an institutional importance: "[I]t deepened the roots of 'judicial empiricism,' or permitted what Sayre calls law without predictability, i.e., law based on judges' 'personal predilictions and particular dispositions.' "[190]

Generally, then, the consensus of scholarly opinion, supported by the analysis in section III above,[191] is that *Hunt* did not constitute a major substantive change in the doctrine of criminal conspiracy. There was a hiatus in prosecutions immediately after *Hunt*, but the

187. *Id.* at 65.
188. *Id.* at 68.
189. *Id.* at 71 (citations omitted).
190. *Id.* at 72 (quoting Sayre, *supra* note 46). Turner does not explain the "predilictions" or "dispositions" that led Shaw to the specific result in *Hunt*.
191. *See supra* text accompanying notes 46-68.

doctrine reappeared in its former vigor after the Civil War; indeed, the 1867 case of *State v. Donaldson*,[192] which purports to distinguish *Hunt*, was a leading opinion of the period.[193] The explanations seeking to rationalize Shaw's political background and the apparently pro-labor result in *Hunt* have in common a recognition that the legal principles and reasoning in the opinion do not satisfactorily explain the result in the case. Nelles' tariff theory, Levy's codification theory, and Holt's legitimation theory all focus on some external goal that ostensibly motivated Shaw. The point is substantiated by Turner's concluding observation that *Hunt* puts the judiciary "in charge" of the outcomes in a given conspiracy prosecution.[194] None of those explanations, however, is grounded on the economic realities that gave rise to the legal rules in the first instance, and only within that context can the evolution of the law adequately be assessed.

VI. *Hunt* and Workplace Discipline

The conspiracy doctrine originated out of the need of capitalists to impose discipline on workers. With the advent of the factory system, new forms of industrial organization and a "proletarianized" working class emerged. The law of criminal conspiracy facilitated those developments instrumentally and ideologically. Just as the workplace control theory explains the genesis of the legal rule, it explains its particular permutation in *Hunt*. That decision did not create new legal principles, but it did introduce new and significant terms of discourse. Moreover, Shaw did not act contrary to the class interests of capitalism, for the conspiracy doctrine was not by 1842 necessary, either economically or ideologically, to those interests.

A basic tenet of contemporary legal scholarship within the critical legal studies movement is that legal doctrine is intrinsically indeterminate.[195] While legal rules purport to be neutral, objective, and determinate, those rules are in actuality manipulable and ambiguous, permitting a great measure of discretion in their application. According to critical legal scholars, "traditional legal theory requires

192. 32 N.J.L. 151 (1867).

193. *See* Holt, *supra* note 46, at 642.

194. Shaw's opinion "neither removed the possibility nor the likelihood, nor, for that matter, made inevitable the application of the conspiracy doctrine to labor organizations." M. TURNER, *supra* note 46, at 66.

195. For a recent treatment of the point, see Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Explanation*, 6 CARDOZO L. REV. 917 (1984). *See also* Boyle, *supra* note 58; Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731 (1985); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1985).

a relatively large amount of determinacy as a fundamental premise of the rule of law. Our legal system, however, has never satisfied this goal."[196] The crucial weakness of traditional legal reasoning is that "legal results can never be adequately explained by doctrinal materials." Likewise, policy is not an appropriate basis of judicial decision, for "arguments from principles and policies, like doctrinal arguments, are infinitely malleable."[197] Given such indeterminacy, it is necessary to analyze the values implicit in labor law from a social and historical perspective.[198]

By the time of *Hunt*, the creation of a working class — that is, the development of an adequate supply of labor for the new system of production — had successfully been accomplished. After describing four significant sources of labor from which the early nineteenth-century capitalist had been able to draw, Gordon, Edwards, and Reich conclude that as of the early 1840's, "the dearth and dearness of American labor no longer presented an insurmountable obstacle to a growing capitalist sector."[199] The economy entered upon a period of "consolidation" that extended into the 1870's and was characterized by rapid economic expansion.[200] The authors note as follows: "There can be little doubt . . . that the solution of the labor problem provided the key to the construction of a viable social structure of accumulation."[201]

Hunt thus can be understood in light of the economic context described by Gordon, Edwards, and Reich. Workers were not accorded meaningful legal power as a consequence of the *Hunt* holding. With the availability of a reserve army of labor, employers were not easily coerced by group activity. If workers undertook a strike, the most efficacious response was to discharge the strikers and hire more employees, rather than to engage in a lengthy criminal action. The absence of prosecution immediately following *Hunt*[202] is much more consistent with the growing economic power of employers than with the precedential force of *Hunt*, for, as observed, the decision attracted little attention. Thus, one academic anomaly in interpreta-

196. Singer, *supra* note 195, at 13.

197. Yablon, *supra* note 195, at 930.

198. The classic example of critical methodology in labor law analysis is Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1977). *See also* Klare, *Labor Law as Ideology*, 4 INDUS. REL. L.J. 450 (1981).

199. D. GORDON, R. EDWARDS & M. REICH, *supra* note 8, at 77.

200. *Id.* at 79-94.

201. *Id.* at 79.

202. "The only period for which no [conspiracy] cases were found was in the ten years immediately following *Commonwealth v. Hunt*." M. TURNER, *supra* note 46, at 68.

tion is removed.

The language of *Hunt* further supports the workplace control and labor market explanation, in that the opinion depicts an economic world profoundly different from the world of the earlier cases. *Hunt* transformed the ideology of the conspiracy doctrine and generated a discourse of a markedly different tenor. Most significantly, the notion of "community" figuring so prominently in the doctrine is replaced by a universe dominated by the economic behavior of individuals.

The greater part of Shaw's opinion in *Hunt* consists of a technical discussion regarding the form of the indictment. When addressing the policy underlying the conspiracy doctrine, which had been a major concern of judges such as Levy and Roberts, and of Judge Thacher in the trial court,[203] Shaw does not describe workers' combinations as injurious to the community; rather, he depicts a collection of individual entrepreneurs freely competing against and contracting with one another. An association of consumers, for example, might entice a rival baker to compete with an established one. Even if the former baker were impoverished, Shaw says, no legal wrong occurred, because it is by means of such competition that the economic interests of all individuals are advanced.[204] A similar analysis underlies Shaw's view of employment contracts. Labor markets are characterized by an equality of opportunity by which "every free man, whether skilled laborer, mechanic, farmer or domestic servant, may work or not work, or work or refuse to work with any company or individual, at his own option, except so far as he is bound by contract."[205]

The primacy of contractual ordering in a competitive market environment emphasized in *Hunt* has an obvious affinity with the rise of "legal formalism" occurring in the mid-nineteenth century. By that time, judicial reasoning was no longer primarily an instrument of policy, but had become "an intellectual system which gave common law rules the appearance of being self-contained, apolitical, and inexorable, and which, by making 'legal reasoning seem like mathematics,' conveyed 'an air . . . of . . . inevitability' about legal decisions."[206] Importantly, legal formalism demonstrated an obvious

203. *See supra* note 148.

204. *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 134 (1842).

205. *Id.* at 133.

206. M. HORWITZ, *supra* note 68, at 254 (quoting Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 7 (1894)).

connection with the ideology of contractualism[207] in a market economy. As Morton Horwitz states:

> Since only the market could supply "neutral" principles of distribution free from all "political" (that is, dangerously equalitarian) influences, it became the task of the law to create legal doctrines that simply mirrored the market. Most of the basic dichotomies in legal thought of the nineteenth century — between law and politics, law and morality, objective and subjective standards, distributional and allocational goals — arose to establish the objective nature of the market and to neutralize and hence defuse the political and redistributional potential of law.[208]

Consequently, *Hunt* reflects the shift from an instrumentalist to a formalist ideology of law. In that regard, *Hunt* was of significant precedential value, as the evolution of subsequent judicial discourse reveals.

In *State v. Donaldson*,[209] the defendants were charged with conspiring to force their employers to discharge two journeymen. When the employers refused, the defendants quit their employment until the demand was met. Chief Justice Beasley of the New Jersey Supreme Court refused to quash the indictment, holding that an indictable offense had been charged at common law.

Beasley relied on a definition of conspiracy which was substantially identical to that in *Hunt*. He stated that a conspiracy to effect an end that was of an indictable nature, or one adopting means of an indictable character, was unlawful. Although a statute in New Jersey prohibited conspiracies that injured trade, Beasley did not rely on that legislation. He concluded that the act of the defendants, "if it could be said to injure trade at all, did so not proximately, but remotely."[210] The common law of conspiracy, however, had not been superseded by the statute, and it provided a source of law governing the case.

Beasley found that the unlawful conduct in the case consisted in the defendants' attempts to dictate to the employer whom the employer should discharge. "This was an unwarrantable interference

207. For a treatment of the historical evolution of contract law and its relation to ideology, see Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983). Feinman's argument is that "contract is a device by which a dominant class imposes and perpetuates a hierarchical capitalist economy on society. Contract law is continually refashioned to meet the changing needs of the dominant class." *Id.* at 849.

208. M. HORWITZ, *supra* note 68, at 256.

209. 32 N.J.L. 151 (1867).

210. *Id.* at 155.

with the conduct of [the employer's] business, and it seems impossible that such acts should not be, in their usual effects, highly injurious."[211] The conspiracy did not constitute a harm to the community, but burdened the exchange of labor in a free market of individual parties. By acting together, the workers as a collective entity had coerced their employers. Beasley described the unlawful character of such conduct as follows:

> In the natural position of things, each man acting as an individual, there would be no coercion; if a single employe should demand the discharge of a co-employe, the employer would retain his freedom, for he could entertain or repel the requisition without embarrassment to his concerns; but in the presence of a coalition of his employes, it would be but a waste of time to pause to prove that, in most cases, he must submit, under pain of often the most ruinous losses, to the conditions imposed on his necessities.[212]

Thus, the concern of the law was to insure the "freedom" and "equality" of the marketplace; workers might treat with the employer on an individual basis, but the "coercion" attendant upon a confederacy of workers was inconsistent with an employer's "rights" in conducting his business. The ideological thrust of *Hunt* was thus adopted and extended.[213]

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211. *Id.*

212. *Id.* at 156.

213. Consistent with Horowitz's thesis, the evolution of the common law in this specific instance reflected a movement away from law as an explicit instrument of social policy and toward a reliance on the consensual market ordering of labor transactions so as to provide an objective and apolitical basis for legal rules. That view remains the foundation of the "economic analysis" approach to the law of labor relations. *See, e.g.*, Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984). The ideological power of the "law and economics" movement derives from its claim to a scientific methodology for developing and applying legal principles. Richard Posner, the foremost theorist of economic analysis, proposes that wealth maximization should be the articulate objective of legal doctrine, that it is the ethically and politically superior principle, and that "the common law is best explained as if the judges were trying to maximize economic welfare." R. POSNER, THE ECONOMICS OF JUSTICE 4 (1981); *see also id.* at 88-115. The "wealth maximization" concept, however, has been criticized as merely a reformulation of social policy-making in the guise of "science." Horwitz, for example, observes as follows: "only the prestige of the sciences could have brought law-and-economics such prominence during the past two decades. And I take ["Wealth Maximization"] as a dramatic sign that the scientific pretensions of the economic analysis of the law are rapidly crumbling." According to Horwitz, law and economics practitioners have become "overt apologists for a grossly unequal Distribution of Wealth," and consequently, "it is only a matter of time before they are pluralistically assigned to the class of one of the many 'ideologies' from which one may pick and choose." Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905, 905, 912 (1980). In fact, critical legal theory now rivals law and economics as an area of academic inquiry. *See* Reidinger, *Civil War in the Ivy*, A.B.A.J., Nov. 1, 1986, at 64.

Further, as this study demonstrates, the common law was actively molded by judges to

Regarding the legal content of *Hunt*, Beasley demonstrates with striking clarity the indeterminacy of a rule of law in its application. The facts of *Donaldson* and *Hunt* are analytically indistinguishable; the defendants in both cases sought through pressure on the employer to exclude nonmember journeymen from employment and thereby, to attain economic benefits. Yet Beasley asserts that the association in *Hunt* was "not concentrated with a view to be exerted to oppress any individual, and it was consequently entirely unlike the case of men who take advantage of their position, to use the power, by a concert of action, which such position gives them, to compel their employer to a certain line of conduct."[214] On that basis, the two cases were deemed "not parallel" and subject to "entirely different considerations."[215]

Donaldson consequently illustrates that *Hunt* did little to vitiate the instrumental usefulness of the criminal conspiracy doctrine for, as previously indicated, prosecutions continued until the end of the nineteenth century. Following *Hunt*, the terms of the pertinent discourse had been altered. As the social structure of accumulation associated with proletarianization and the factory system began to decay, a succeeding phase of capitalist development gradually emerged. That phase required a transformation of the labor process from skilled craft work to relatively unskilled and "homogenized" labor.[216] It was associated with the advent of scientific management as a form of organization and employment at will as a legal rule and ideology.[217] Many of the essential concepts of that legal doctrine, such as "freedom of contract" and "equality of liberty and property" for individuals,[218] are wholly compatible with *Hunt*. While *Hunt* did

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conform to the needs of capitalism at a particular historical moment under particular conditions of production. The law provided and legitimated "rights" for employers, thus establishing a structure of employment relations that was subsequently validated through the device of a "market." In that market, workers were prohibited from dealing from a position of collective strength but were legally obligated to bargain from a position of individual weakness. For that reason, it is hardly appropriate to describe the process as one involving the "economics of justice." More accurately, it can be described as the "justice of economics."

214. State v. Donaldson, 32 N.J.L. 151, 157-58 (1867).

215. *Id.* at 158.

216. *See* D. GORDON, R. EDWARDS & M. REICH, *supra* note 8, at 100-64.

217. *See* Hogler, *Employment at Will and Scientific Management: The Ideology of Workplace Control*, 3 HOFSTRA LABOR L.J. 27 (1985).

218. *See, e.g.*, Adair v. United States, 208 U.S. 161 (1908). There, the Court stated as follows:

> While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government — at least in the absence of contract between the parties — to compel any person in the course of his busi-

not produce a new legal rule governing conspiracy prosecutions, it did anticipate a new realm of discourse in the legal relations between labor and capital. In that sense, it was an eminently successful judicial opinion.

VII. Conclusion

The criminal conspiracy doctrine can only be fully comprehended in its precise historical and economic context. As a legal rule, its economic utility was class-biased. The ideological thrust of the law, however, was even greater in impact than its instrumental coercion; legal ideology significantly furthered the creation of a working class and its acclimation to capitalist discipline and justified the consequences in the name of the communal good. *Hunt* did not reflect a modification in the law so much as a change in the economic circumstances that shaped the common law. Shaw conceded a point of slight significance — the innocence of the particular defendants in one case — and introduced a new image of the relationship between labor and capital, one based on the existence of a marketplace composed of atomistic individuals. Certainly *Hunt* was not a betrayal of the interests of capitalism. Critical analysis reveals, to the contrary, that Shaw brilliantly furthered those interests in the guise of judicial acumen.

> ness and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.

Id. at 174.